(27)

No. 03-633
Title: Donald P. Roper, Superintendent, Potosi Correctional Center, Petitioner
v.
Christopher Simmons
Docketed: October 29, 2003
Lower Ct: Supreme Court of Missouri
Case Nos.: (SC84454)
Decision Date: August 26, 2003
Questions Presented

~~Date~~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~~~
Oct 24 2003	Petition for a writ of certiorari filed. (Response due November 28, 2003)
Oct 24 2003	Appendix of Donald P. Roper, Superintendent, Potosi Correctional Center filed.
Dec 2 2003	Order extending time to file response to petition to and including December 24, 2003.
Dec 23 2003	Brief of respondent Christopher Simmons in opposition filed.
Dec 23 2003	Motion for leave to proceed in forma pauperis filed by respondent Christopher Simmons.
Jan 5 2004	Reply of petitioner Donald P. Roper, Superintendent, Potosi Correctional Center filed.
Jan 7 2004	DISTRIBUTED for Conference of January 23, 2004.
Jan 26 2004	Motion for leave to proceed in forma pauperis filed by respondent GRANTED.
Jan 26 2004	Petition GRANTED.
Feb 19 2004	Extension of time within which to file the joint appendix and petitioner's brief on the merits to and including April 20, 2004.
Mar 5 2004	Motion to appoint counsel filed by respondent Christopher Simmons.
Mar 17 2004	Motion DISTRIBUTED for Conference of April 2, 2004.
Apr 20 2004	Brief amici curiae of Alabama, Delaware, Oklahoma, Texas, Utah, and Virginia filed.
Apr 20 2004	Brief amicus curiae of Justice for All Alliance filed.
Apr 20 2004	Brief of petitioner Donald P. Roper, Superintendent, Potosi Correctional Center filed.
Apr 20 2004	Joint appendix filed.
Apr 27 2004	Motion DISTRIBUTED for Conference of May 13, 2004.
May 7 2004	Extension of time within which to file respondent's brief on the merits to and including July 6, 2004.
May 17 2004	Motion to appoint counsel filed by respondent GRANTED. Jennifer Herndon, Esq., of St. Louis, Missouri is appointed to serve as counsel for the respondent in this case.
Jun 25 2004	Extension of time within which to file respondent's brief on the merits to and including July 19, 2004.
Jul 12 2004	Brief amicus curiae of Murder Victims' Families for Reconciliation filed.
Jul 13 2004	Brief amicus curiae of Missouri Ban Youth Executions (Bye) Coalition filed.
Jul 14 2004	Brief amici curiae of United States Conference of Catholic Bishops and Other Religious Organizations filed.
Jul 15 2004	Brief amici curiae of Human Rights Committee of the Bar of England and Wales, et al. filed.
Jul 16 2004	Brief amicus curiae of Coalition for Juvenile Justice filed.
Jul 16 2004	Brief amici curiae of American Medical Association, et al. filed.
Jul 16 2004	Brief amicus curiae of National Legal Aid and Defender Association filed.

Jul 19 2004	Brief amici curiae of European Union and Members of the International Community filed.
Jul 19 2004	Brief amicus curiae of American Bar Association filed.
Jul 19 2004	Brief of respondent Christopher Simmons filed.
Jul 19 2004	Brief amicus curiae of Constitution Project filed.
Jul 19 2004	Brief amici curiae of American Psychological Association, et al. filed.
Jul 19 2004	Brief amici curiae of Former U.S. Diplomats Morton Abramowitz, et al. filed.
Jul 19 2004	Brief amici curiae of New York, et al. filed.
Jul 19 2004	Brief amici curiae of NAACP Legal Defense and Educational Fund, Inc., et al. filed.
Jul 19 2004	Brief amici curiae of President James Earl Carter, Jr., et al. filed.
Jul 19 2004	Brief amici curiae of Juveniile Law Center, et al. filed.
Jul 23 2004	CIRCULATED.
Aug 12 2004	Application (04A125) to extend the time to file a reply brief from August 23, 2004 to September 7, 2004, submitted to Justice Thomas.
Aug 17 2004	Application (04A125) Extension of time for filing the reply brief on the merits is granted to and including September 7, 2004.
Aug 19 2004	Record received from Supreme Court of Missouri. (1 box)
Aug 24 2004	SET FOR ARGUMENT Wednesday, October 13, 2004.
Aug 24 2004	Lodging proposal of counsel for respondent.
Sep 7 2004	Reply of petitioner Donald P. Roper, Superintendent, Potosi Correctional Center filed. (Distributed)
Oct 13 2004	Argued. For petitioner: James R. Layton, State Solicitor, Jefferson City, Mo. For Respondent: Seth P. Waxman, Washington, D.C.

FILED
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No. 03-
(CAPITAL CASE)

In the
SUPREME COURT OF THE UNITED STATES
October term, 2003

DONALD P. ROPER,
Superintendent, Potosi Correctional Center,
Petitioner,

v.

CHRISTOPHER SIMMONS,
Respondent.

On Petition for a Writ of Certiorari
to the Supreme Court of Missouri

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW
(Capital Case)

The Supreme Court of Missouri departed from this Court's holding in *Stanford v. Kentucky*, 492 U.S. 361 (1989), in which the Court upheld statutes under which the minimum age for capital punishment is sixteen. The Missouri court's decision raises two questions:

1. Once this Court holds that a particular punishment is not "cruel and unusual" and thus barred by the Eighth and Fourteenth Amendments, can a lower court reach a contrary decision based on its own analysis of evolving standards?

2. Is the imposition of the death penalty on a person who commits a murder at age seventeen "cruel and unusual," and thus barred by the Eighth and Fourteenth Amendments?

PARTIES TO THE PROCEEDING

Petitioner, Donald P. Roper, is the Superintendent of the Potosi Correctional Center, Missouri, where Respondent Christopher Simmons is confined.

Respondent Simmons is a prisoner in state custody pursuant to his conviction for first degree murder for which the jury sentenced him to capital punishment. He was the petitioner in the habeas corpus proceeding in the Supreme Court of Missouri.

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OPINIONS BELOW

The August 26, 2003 decision of the Supreme Court of Missouri, from which petitioner seeks review, is reported at 112 S.W.3d 397 and is published in the Appendix at App. A-2.

JURISDICTION

The opinion of the Supreme Court of Missouri was issued on August 26, 2003. Petitioner invokes this court's jurisdiction under 28 U.S.C. §1257(a) (2000). The court below had jurisdiction under its own Rules 91.01(b) and 92.02(b).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States, Amendment VIII:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Constitution of the United States, Amendment XIV, Section 1:

> [Nor] shall any state deprive any person of life, liberty or property without due process of law . . . .

Mo. Rev. Stat. § 565.020 (1994):

> 1. A person commits the crime of murder in the first degree if he knowingly

causes the death of another person after deliberation upon the matter.

2. Murder in the first degree is a class A felony, and the punishment shall be either death or imprisonment for life without eligibility for probation or parole, or release except by act of the governor; ex ept that, if a person has not reached his sixteenth birthday at the time of the commission of the crime, the punishment shall be imprisonment for life without eligibility for probation or parole, or release except by act of the governor.

Missouri Supreme Court Rule 91.01(b):

Any person restrained of liberty within this state may petition for a writ of habeas corpus to inquire into the cause of such restraint.

STATEMENT OF THE CASE

Respondent Christopher Simmons was convicted of a murder he committed while seventeen years of age. After his conviction was upheld, he sought a writ of habeas corpus from the Supreme Court of Missouri. That court granted the writ and resentenced Simmons to life imprisonment. In doing so, the court relied on the Eighth Amendment to the United States Constitution – despite contrary, binding precedent from this Court.

1. The Murder

In early September 1993, Simmons, then age seventeen, discussed with his friends, Charlie Benjamin (age fifteen) and John Tessmer (age sixteen), the possibility of committing a burglary and murdering someone. On several occasions, Simmons described the manner in which he planned to commit the crime: he would find someone to burglarize, tie the victim up, and ultimately push the victim off a bridge. Simmons assured his friends that their status as juveniles would allow them to "get away with it."

On September 8, 1993, Simmons arranged to meet Benjamin and Tessmer at around 2:00 a.m. the following morning for the purpose of carrying out the plan. The trio met at the home of Brian Moomey, a twenty-nine year old convicted felon. Tessmer refused to go with Simmons and Benjamin. He returned home, while Simmons and Benjamin went to commit a burglary.

The two found a back window cracked open at the rear of Shirley Crook's home. They opened the window, reached through, unlocked the back door, and entered the house. Moving through the house, Simmons turned on a hallway light. The light awakened Mrs. Crook, who was home alone. She sat up in bed and asked, "Who's there?" Simmons entered her bedroom and recognized Mrs. Crook as a woman with whom he had previously had an automobile accident. Mrs. Crook apparently recognized Simmons as well.

Simmons ordered Mrs. Crook out of her bed and, when she did not comply, Simmons forced her to the floor with Benjamin's help. While Benjamin guarded Mrs. Crook in the bedroom, Simmons found a roll of duct tape, returned to the bedroom and bound her hands behind her back. The two also taped Mrs. Crook's eyes and mouth shut. They walked Mrs. Crook from her home and placed her in the back of her minivan. Simmons drove the van from Mrs. Crook's home in Jefferson County to Castlewood State Park in St. Louis County.

Simmons parked the van near a railroad trestle that spanned the Meramec River. When he and Benjamin began to unload Mrs. Crook from the van, they discovered that she had freed her hands and had removed some of the duct tape from her face. Using Mrs. Crook's purse strap, the belt from her bathrobe, a towel from the back of the minivan, and some electrical wire found on the trestle, Simmons and Benjamin bound Mrs. Crook again, restraining her hands and feet and covering her head with a towel. Simmons and Benjamin walked Mrs. Crook to the railroad trestle.

There, Simmons bound her hands and feet together, hog-tied fashion, with the electrical cable and covered Mrs. Crook's face completely with duct tape. Simmons then pushed her off the railroad trestle into the river below. At the time she fell, Mrs. Crook was alive and conscious. Simmons and Benjamin threw Mrs. Crook's purse into the woods and drove the van back to the mobile home park across from the subdivision in which Mrs. Crook lived.

Later that day, Simmons went to Moomey's trailer and bragged to Moomey that he had killed a woman "because the bitch seen my face." In the meantime, Steven Crook, Shirley's husband, returned home from an overnight trip and discovered that his wife had not gone to work as scheduled. When he did not hear from his wife by that evening, he filed a missing person's report.

That same afternoon, two fishermen found a body floating in the Meramec River, three quarters of a mile down stream from the railroad trestle. The fishermen notified authorities, who removed the body. The medical examiner identified the body from fingerprints, determined the cause of death as drowning and noted that the victim was alive prior to being pushed from the bridge. The examiner also reported that Mrs. Crook had sustained several fractured ribs and considerable bruising and that these injuries did not result from her fall from the railroad trestle.

The next day, September 10, police received information that Simmons was involved in the murder. They arrested Simmons and took him to the Fenton

Police Department. Police read Simmons the warnings required by *Miranda v. Arizona*, 384 U.S. 436 (1966). Simmons waived his constitutional right to counsel and, after a little less than two hours of questioning, confessed to the murder. He also agreed to videotape a confession and to take part in a videotaped "reenactment" of the murder at the crime scene (Appendix A-57 to A-60).

2. The Trial, Post-conviction Proceedings, Appeals, and Federal Habeas

At trial, the jury found Simmons guilty of first degree murder and recommended a sentence of death. The jury found three statutory aggravating circumstances in the murder of Shirley Crook: (1) it was committed for the purpose of receiving money or any other thing of value, (2) it was committed for the purpose of avoiding, interfering with or preventing a lawful arrest of Simmons; and (3) it involved depravity of mind, and as a result thereof, the murder was outrageously and wantonly vile, horrible, and inhuman. The murder involved depravity of mind because Simmons killed Shirley Crook after she was bound, thereby exhibiting a callus disregard for human life. The trial court sentenced Simmons to death.

Simmons filed a motion for post-conviction relief under Missouri Supreme Court Rule 29.15. After an evidentiary hearing, the court denied the motion.

Simmons pursued a consolidated appeal with the Supreme Court of Missouri. That court affirmed Simmons' conviction and sentence and affirmed the denial of post-conviction relief. *State v. Simmons*, 944 S.W.2d 165 (Mo. banc 1997) (Appendix A-56). This court denied review. *Simmons v. Missouri*, 522 U.S. 953 (1997).

Simmons pursued federal habeas corpus relief under 28 U.S.C. §2254 (2000). The United States District Court for the Eastern District of Missouri denied the petition for writ of habeas corpus. *Simmons v. Bowersox* , No. 4:97-CV-2415 JCH (E.D. Mo. Aug. 5, 1999). The United States Court of Appeals for the Eighth Circuit affirmed the denial of habeas relief. *Simmons v. Bowersox*, 235 F.3d 1124 (8th Cir. 2001). This court denied review. *Simmons v. Bowersox*, 534 U.S. 924 (2001).

3. State Habeas

The present litigation began on May 3, 2002, when Simmons filed a petition for writ of habeas corpus with the Supreme Court of Missouri pursuant to that court's Rules 91.01(b) and 91.02(b) (Appendix A-121). After receiving memoranda from Simmons and the state, the court issued a writ of habeas corpus (Appendix A-141); the state then filed a return.

On August 26, 2003, the Missouri court set aside Simmons' death sentence and resentenced him to life imprisonment without eligibility for probation, parole or relief except by act of the Governor (Appendix A-5). According to the Missouri court, Simmons' Eighth Amendment rights were violated by his capital sentence because he was seventeen when he murdered Mrs. Crook. Writing for the dissent, Judge Price found the issue resolved by this court's decision in *Stanford v. Kentucky*, 492 U.S. 361 (1989).

REASONS FOR GRANTING THE WRIT

The Court should issue a writ of certiorari for three reasons.

The first arises from the implicit assertion by the Supreme Court of Missouri of a novel interpretation of the law regarding the value of this Court's precedent. The Missouri court has in effect held that it is not bound by this Court's prior holdings as to what constitutes "cruel and unusual punishment" in violation of the Eighth Amendment. Turning over the responsibility for defining "cruel and unusual punishment" to the lower courts would wreak havoc and sow inequity throughout the nation.

The second reason arises from the Missouri court's ultimate conclusion: that imposing capital punishment on a seventeen-year-old who thumbs his nose at the law while committing a heinous murder violates the Eighth Amendment. That conclusion is contrary to not just this Court's holding in *Stanford v. Kentucky*, 492 U.S. 361 (1989), but to many holdings in state and federal courts that rely on the *Stanford* decision. The conflict among those decisions, like the assertion of the authority to depart from *Stanford*, promises confusion and inequity.

And third, even independent of that conflict, the question of the age at which capital punishment may be applied is an important one – particularly in an era when the imposition of adult penalties on juvenile offenders has become more common.

I. The Missouri court's rationale permits lower courts to depart from this Court's Eighth Amendment precedents based on their own evolving and subjective views of what constitutes "cruel and unusual punishment."

In *Stanford v. Kentucky*, this Court held that the Eighth and Fourteenth Amendments did not prohibit imposition of capital punishment for murder committed at age sixteen or seventeen. 492 U.S. at 370-77. The decision in *Stanford* has not been overturned by this court, even though the Court has had recent opportunities to do so. See *Mullin v. Hain*, 538 U.S. ___, 123 S.Ct. 1654 (2003) (Mem. Order) (order granting application to vacate the stay of execution of defendant who was seventeen years old when he committed murder); *In re Stanford*, 537 U.S. 968 (2002) (denying writ of habeas corpus of petitioner who was seventeen years old when he committed murder); *Patterson v. Texas*, 536 U.S. 984 (2002) (denying writ of habeas corpus of petitioner who was seventeen years old when he committed murder).

Decisions of this Court interpreting the Constitution are, of course, the supreme law of the land. U.S. Const. Article VI; *Cooper v. Aaron*, 358 U.S. 1, 18 (1958). And "it is this Court's prerogative alone to overrule one of its precedents." *State Oil Co. v. Kahn*, 522 U.S. 3, 20 (1997). That is true even if the "'changes in judicial doctrine' ha[ve] significantly undermined this Court's prior holding," *United States v. Hatter*, 532 U.S. 557, 567 (2001), quoting *Hatter v.*

United States, 64 F.3d 647, 650 (Fed. Cir. 1995), even if the Court's prior holding "appears to rest on reasons rejected in some other line of decisions," *Rodriguez De Quinas v. Shearson/American Express*, 490 U.S. 477, 484 (1989), and even if this Court's holding rests on "'increasingly wobbly, moth-eaten foundations,'" *State Oil Co. v. Kahn*, 522 U.S. at 20, quoting *Kahn v. State Oil Co.*, 93 F.3d 1358, 1363 (7th Cir. 1996).

By reaching a conclusion diametrically opposed to the holding in *Stanford v. Kentucky*, the Supreme Court of Missouri may have rejected that rule outright – a rejection that would merit summary reversal. But more likely, the Missouri court has carved out an exception to the rule – *i.e.*, it has concluded that the rule does not apply in the Eighth Amendment context. That exception leaves lower courts free to create their own definitions of "cruel and unusual punishment." And there is little likelihood that state and federal courts would reach unanimity on the most serious questions regarding Eighth Amendment protections.

The Missouri court departed from *Stanford* by following a rationale – not a holding – that it derived from *Atkins v. Virginia*, 536 U.S. 304, 312 (2002). The court concluded that the Eighth Amendment's evolving "standards of decency" are fluid. Appendix A-19 to A-20. Of course, the departure from *Stanford* lacks support in *Atkins*. Indeed, the premise that *Atkins* might have overruled *Stanford* was seemingly rejected by this court in *Atkins*. *Atkins v. Virginia*, 536 U.S. at 316 n.18. And one searching the analysis in *Atkins*, finds no basis there to carve out Eighth Amendment cases from the time-honored principles of stare decisis.

Nor would one find such a basis in other decisions of this Court. Indeed, while current Eighth Amendment analysis requires that the amendment "draw its meaning from the evolving standards of decency that mark the progress of maturing society," *Atkins v. Virginia*, 536 U.S. at 311-12 quoting *Trop v. Dulles*, 356 U.S. 86, 100-101 (1958), there is no Supreme Court decision since *Trop* that suggests that this Court's Eighth Amendment precedents lose their binding effect as standards of decency "evolve."

To allow that result – to permit lower courts to ignore the precedential value of this Court's Eighth Amendment decisions – would authorize lower courts to rule that a penalty does or does not violate the Eighth Amendment based on those courts' independent notions of evolving standards of decency instead of resolving the question based upon this Court's precedent. But Eighth Amendment precedent from this Court should be precedent, not merely a starting point of analysis of evolving standards of decency. Offenders threatened by capital sentences and the states imposing such sentences should be able to rely upon precedent from this Court to define what is permissible under the Eighth Amendment – precisely as the Missouri Legislature relied upon *Stanford v. Kentucky* when, in 1990, it amended Mo. Rev. Stat. § 565.020 (1994) to prohibit capital punishment for those who murder before their sixteenth birthday. *Compare* Mo. Rev. State § 565.020.2 (1986) with § 565.020.2 (1994).

The need for assurance, consistency, and continuity in the application of the Eighth Amendment is not limited, of course, to the context of capital cases.

Indeed, the Missouri Supreme Court's implicit holding that the Eighth Amendment permits an exception to the rule that this Court's precedents remain binding is not logically limited to that context. And there is nothing unique to Missouri or to this case to suggest that the path chosen by the Missouri Supreme Court will not be inviting to other courts. Thus courts following that path may hold that any number of this Court's Eighth Amendment precedents are no longer binding, *i.e.*, that what this Court declared not to be "cruel and unusual" has now become such. Indeed, if the Missouri path remains unblocked, there will be no logical barrier to courts holding that acts this Court once held to be "cruel and unusual" no longer fit that description. Again, that would sow inequity and wreak havoc throughout the justice system. This Court should grant the petition and prevent that result.

II. The Missouri holding conflicts not just with *Stanford v. Kentucky*, but also with post-*Atkins* decisions by other state and federal courts.

At the time of Simmons' trial, the question of whether his Eighth and Fourteenth Amendment rights would be violated by a capital punishment sentence because he murdered when he was seventeen years old appeared to have been decided in *Stanford v. Kentucky* and its companion case from Missouri, *Wilkins v. Missouri*, 487 U.S. 1233 (1988). The *Stanford* rule – permitting death penalty statutes that exclude those younger than sixteen from the death penalty – was apparently binding throughout the United States. By holding that *Stanford* no longer applies to claims made in Missouri under the Eighth Amendment because of

Atkins, (App. A-19 to A-21), the Missouri Supreme Court has created a conflict with *Stanford*, and it has created a conflict with post-*Stanford*, post-*Atkins* decisions from other states. That conflict merits this Court's attention.

On the same day the Missouri Supreme Court issued its decision, the Court of Appeals for the Fifth Circuit issued a conflicting, unpublished decision in *Villarreal v. Dretke*, No. 03-20248. In *Villarreal*, the offender was seventeen years old when he murdered a fourteen year old girl. The offender sought federal habeas relief by arguing that his Eighth Amendment rights were violated by the execution of one who was younger than eighteen when he murdered. *Id.*, slip op. at 2-3. Relying on *Stanford*, the Fifth Circuit denied relief:

> Although decided well before the *Atkins* decision, the Supreme Court addressed and rejected arguments similar to Villarreal's, namely arguments against the execution of certain juveniles based on evolving standards of decency and the mental capacity of juveniles in *Stanford v. Kentucky*, 492 U.S. 361 (1989). This decision has not been overruled and Villarreal's arguments fall within the *Stanford* holding. . . .

Id., slip op. at 3-4. The court specifically rejected the Missouri court's conclusion that *Atkins* opened the door to departure from *Stanford*:

> [T]here is nothing in the Supreme Court's *Atkins* opinion overruling or changing

> *Stanford* and any application of *Atkins* or the rationale employed by the Supreme Court in *Atkins* to Villarreal's petition is a decision only the Supreme Court can make.

Id., slip op. at 4.

Three days after the Missouri Supreme Court and the Fifth Circuit issued their conflicting decisions, the Alabama Court of Criminal Appeals took the Fifth Circuit's route, relying on *Stanford v. Kentucky* to uphold the death sentence of a defendant who was seventeen years old when he killed. *Adams v. State*, 2003 WL 22026043 (Ala. Crim. App. Aug. 29, 2003) at *60.

Six months before, the Mississippi Supreme Court took that same route, denying relief to an offender who was seventeen years old when he killed. *Foster v. State*, 848 So.2d 172 (Miss. 2003). Using language similar to that of the Fifth Circuit in *Villarreal*, that court expressly rejected the idea that *Atkins* had opened the door to a departure from *Stanford*:

> Foster argues that the same national consensus that caused the United States Supreme Court to ban the execution of the mentally retarded in *Atkins* also exists in opposition to execution of those who committed their crimes as juveniles, and this Court should recognize such a prohibition at this time. This Court finds that the United States

> Supreme Court has prohibited the execution of those who committed their crimes at age fifteen in *Thompson v. Oklahoma*, 487 U.S. 815, 108 S.Ct. 2687, 101 L.Ed.2d 702 (1988), but declined in *Stanford v. Kentucky* . . . to do so for those who committed their crimes at age sixteen or seventeen.

Id. at 175-76.[1]

At the very least, then, persons in Missouri are treated differently, vis-a-vis this Court's *Stanford* precedent, than are persons in Mississippi, Texas, and Louisiana. That inequity would be enough to demand review of this Court. But again, it is only the beginning, for the Missouri precedent opens the door for other courts to depart not just from *Stanford*, but from this Court's precedents on other Eighth Amendment questions. That conflicts of this sort will multiply, as other courts follow the trail blazed by the Missouri Supreme Court, is certain.

III. The question of a minimum age for imposition of capital punishment is an important one that merits review.

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[1] Also, five months after *Atkins* was decided, the Louisiana Supreme Court dismissed in a brief footnote the possibility that *Atkins* modified *Stanford* – albeit without discussion, and without any suggestion that the defendant had made such a claim. *State v. Williams*, 831 So.2d 835, 857 n. 32 (La. 2002).

It is simply untenable to leave open the question of the age at which the death penalty can constitutionally be applied. The importance of a firm, national answer to that question explained this Court's grant of certiorari review in *Stanford* fourteen years ago. *See Stanford v. Kentucky*, 492 U.S. at 368 citing *Stanford v. Kentucky*, 488 U.S. 887 (1988). That the matter retains its importance is shown by the repeated requests that this court reconsider the answer it gave in *Stanford*. *See* page 9, *supra*.

The need to provide clear constitutional rules regarding the imposition of the death penalty (and perhaps other penalties) on those under or even at age 18 has grown, not diminished, since this Court decided *Stanford*. In 1994, the number of juvenile court cases sent into adult criminal court rose to 12,300. Carol DeFrances and Kevin Strom, Juveniles Prosecuted in State Criminal Courts (DOJ-BJS March 1997). Eleven percent of the juveniles sent into criminal court were charged with murder. Kevin Strom, Steven Smith and Howard Snyder, Juvenile Felony Defendants in Criminal Courts 2 (DOJ-BJS Sept. 1993).

In the death penalty context, at least, *Stanford* provided a clear constitutional rule. The Missouri Supreme Court's decision in this case eliminated that clarity. The Court should grant the petition and remove the analytical debris left by the Missouri court's attack.

CONCLUSION

For the foregoing reasons, petitioner prays the court grant the petition for writ of certiorari.

Respectfully submitted,

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In the
SUPREME COURT OF THE UNITED STATES
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DONALD P. ROPER,
Superintendent, Potosi Correctional Center,
Petitioner,

v.

CHRISTOPHER SIMMONS,
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On Petition for a Writ of Certiorari
to the Supreme Court of Missouri

APPENDIX

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SUPREME COURT OF MISSOURI

en banc

State ex rel. Christopher Simmons,	)
Petitioner,	)
vs.	)**No. SC84454**
Donald P. Roper, Superintendent, Potosi Correctional Center,	)
Respondent.	)

ORIGINAL PROCEEDING IN HABEAS CORPUS

Christopher Simmons was sentenced to death for a murder he committed when he was 17 years old. He argues that to execute him for a crime committed when he was under 18 constitutes cruel and unusual punishment.

In ***Thompson v. Oklahoma*, 487 U.S. 815 (1988),** the Supreme Court of the United States held that is constituted cruel and unusual punishment to execute persons who were 15 years of age or younger at the time of their offense. The following year, in ***Stanford v. Kentucky*, 492 U.S. 361 (1989),** the Supreme Court held that there was not then a national consensus against the execution of those who were 16 or 17 years old at the time of their crimes and declined

to bar such executions. On that same day, the Supreme Court held that there was not then a national consensus to bar the execution of those who were mentally retarded. ***Penry v. Lynaugh*, 492 U.S. 302 (1989).**

In 1993, Christopher Simmons murdered Shirley Crook. Because of ***Stanford***, he did not argue that his age constituted a bar to imposition of the death penalty, although he did argue that his age was a mitigating circumstance. He was convicted of first-degree murder and sentenced to death in accordance with the jury's verdict. This Court affirmed his conviction and death sentence, as well as the denial of post-conviction relief. ***State v. Simmons*, 944 S.W.2d 165 (Mo. banc 1997), *cert. denied*, 522 U.S. 953 (1997).**[1]

Last year, in ***Atkins v. Virginia*, 536 U.S. 304 (2002),** the Supreme Court held that a national consensus had emerged against the execution of mentally retarded offenders since ***Penry***. Mr. Simmons now asks us to hold that a similar consensus against the execution of juveniles has developed since ***Stanford***, that the rationale for the Supreme Court's determination that the execution of juveniles was not cruel and unusual punishment has disappeared, and that the Eighth Amendment bars his execution.

This Court agrees. Applying the approach taken in ***Atkins***, this Court finds that, in the fourteen years

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[1]The facts underlying Mr. Simmons' crime and conviction are set out in detail in that opinion and will not be repeated here.

since ***Stanford*** was decided, a national consensus has developed against the execution of juvenile offenders, as demonstrated by the fact that eighteen states now bar such executions for juveniles, that twelve other states bar executions altogether, that no state has lowered its age of execution below 18 since ***Stanford***, that five states have legislatively or by case law raised or established the minimum age at 18, and that the imposition of the juvenile death penalty has become truly unusual over the last decade.[2] Accordingly, this Court finds the Supreme Court would today hold such executions are prohibited by the Eighth and

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[2]The terms "juvenile death penalty" and "juvenile executions" are terms of art used to refer to the execution of those who were under age 18 at the time of their crimes. The term "juvenile" is therefore used in this opinion to refer to those under age 18 when they committed their crime, although the Court recognizes that, for purposes of juvenile division jurisdiction, 17-year-olds are not considered juveniles in Missouri. ***Sec.* 211.031**. Various other states that also treat 17-year-olds as adults for purposes of juvenile court jurisdiction nonetheless do not have a juvenile death penalty - that is, they bar the execution of those under 18 at the time of their crimes. ***See* Office of Juvenile Justice and Delinquency Prevention, *OJJDP Statistical Briefing Book* (Apr. 25, 2002), *at* http://ojjdp.ncjrs.org/ojstatbb/html/qa085.html.** Of course, 16-year-olds are also now subject to the death penalty in Missouri even though they *are* considered juveniles by Missouri's court system, although they can be certified to stand trial as an adult. ***Sec.* 211.071**. In Missouri, a 15-year-old can also be certified for trial as an adult but cannot be subjected to the death penalty. ***Id***. Self-evidently, the death penalty presents different issues than does the issue of who is a juvenile for purposes of juvenile division jurisdiction.

Fourteenth Amendments. It therefore sets aside Mr. Simmons' death sentence and re-sentences him to life imprisonment without eligibility for probation, parole, or release except by act of the Governor.

I. RETROACTIVE APPLICATION OF JUVENILE DEATH PENALTY

The state contends that this Court should not reach the substantive issue whether the execution of persons for crimes committed as juveniles is prohibited by the Eighth and Fourteenth Amendments, because Mr. Simmons is barred from raising it since he did not do so at the time of his trial. We reject this argument.

In ***Penry***, before reaching the substantive issue whether the Eighth Amendment prohibited the execution of the mentally retarded, the Supreme Court considered whether a decision barring such executions would apply retroactively under the principles set out in ***Teague v. Lane*, 489 U.S. 288 (1989).** ***Penry*** answered the question in the affirmative, stating, "[T]he first exception set for in *Teague* should be understood to cover not only rules forbidding criminal punishment of certain primary conduct but also rules prohibiting a certain category of punishment for a class of defendants because of their status or offense." ***Id*. at 330.** The Supreme Court concluded:

> Thus, if we held, as a substantive matter, that the Eighth Amendment prohibits the execution of mentally retarded persons such as Penry regardless of the procedures followed, such a rule would fall under the first exception to the

> general rule of nonretroactivity and would be applicable to defendants on collateral review.

Id.

Penry went on to hold that no national consensus against the execution of the mentally retarded existed in 1989. But, ***Atkins*** found that such a consensus had developed by 2002 and that the Eighth Amendment "'places a substantive restriction on the State's power to take the life' of a mentally retarded offender." ***Atkins*, 536 U.S. at 321, *quoting*, *Ford v. Wainwright*, 477 U.S. 399, 405 (1986).** In ***Johnson v. State*, 102 S.W.3d 535, 539-40 (Mo. banc 2003)**, this Court determined that ***Atkins*** applied retroactively. ***Accord Van Tran v. State*, 66 S.W.3d 790, 811 (Tenn. 2001)** (holding prior to ***Atkins*** that new rule barring execution of mentally retarded would be applied retroactively).

In parallel fashion, if, as a substantive matter, the Eighth Amendment prohibits the execution of persons under age 18 at the time of their offense regardless of the procedures followed, then such a rule would also fall under the first exception to nonretroactivity under ***Teague*** because it would deprive the state of the power to impose the punishment of death on such a person. ***Cf. Penry*, 492 U.S. at 330**. Such a rule would therefore be applicable to persons, such as Mr. Simmons, whose cases are on collateral review, and the usual waiver rules will not

apply.[3] ***See also Reed v. Ross*, 468 U.S. 1, 16 (1984)** ("[W]here a constitutional claim is so novel that its legal basis is not reasonably available to counsel, a defendant has cause for his failure to raise the claim in accordance with applicable state procedures.").

II. NATIONAL CONSENSUS AGAINST EXECUTION OF JUVENILES AND THE MENTALLY RETARDED

To determine whether the application of the death penalty to juveniles constitutes cruel and unusual punishment, it is helpful to examine the Supreme Court's decisions in prior cases addressing the execution of juveniles and of the mentally retarded.

A. The Death Penalty for Juveniles: Thompson and Stanford

1. Thompson v. Oklahoma. In ***Thompson*, 487 U.S. 815 (1988)**, the Supreme Court determined that the Eighth Amendment categorically prohibits the execution of those who were 15 years old or younger at the time of their crimes. Using an approach similar to that which he would utilize in ***Atkins*** some fourteen years later, Justice Stevens, in the principal opinion, said that in determining what constitutes cruel and

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[3]Because, here, ***Teague*** requires retroactive application, and because state courts cannot apply retroactivity principles more narrowly than did ***Teague***, there is no need to undertake the ***Stovall v. Denno*, 388 U.S. 293 (1967)**, analysis discussed by this Court in ***State v. Whitfield*, 107 S.W.3d 253, 267-68 (Mo. banc 2003)**.

unusual punishment, judges should be "guided by the 'evolving standards of decency that mark the progress of a maturing society.'" ***Id.* at 821, *quoting, Trop v. Dulles*, 356 U.S. 86, 101 (1958)**. Such standards cannot remain static, but must "'acquire meaning as public opinion becomes enlightened by humane justice,'" for "'a principle to be vital must be capable of wider application than the mischief which gives it birth.'" ***Id.* at 821 n.4, *quoting, Weems v. United States*, 217 U.S. 349, 373, 378 (1910)**.

To determine current standards of decency, ***Thompson*** examined: (a) relevant legislative enactments, and (b) evidence of how juries viewed the propriety of execution of the mentally retarded. It also considered (c) the views of respected national and international organizations. Finally, in light of the above and other factors, (d) the Supreme Court made its own judgment as to the propriety of such executions and explained "why these indicators of contemporary standards of decency confirm our judgment that such a young person is not capable of acting with the degree of culpability that can justify the ultimate penalty." ***Thompson*, 487 U.S. at 822-23**.

a. Legislative Enactments. In reviewing statutes governing punishment of children, ***Thompson*** found that "[t]he line between childhood and adulthood is drawn in different ways by various States." ***Id.* at 824**. Fourteen state legislatures then barred capital punishment altogether. ***Id.* at 826**. In nineteen other states, the legislature permitted capital punishment, but state statutes failed to expressly state the minimum age for its imposition. ***Id.* at 826-27**.

Eighteen remaining states set a minimum age, varying from 16 to 18. ***Id.* at 829**. No legislature had adopted a statute explicitly permitting the execution of those under age 16. ***Id.***

b. Imposition of the Death Penalty. ***Thompson*** also found that juries rarely imposed the death penalty on those under 16, that only eighteen to twenty such persons had been executed in the 20th century, and only one since 1948. ***Id.* at 832**. Between 1982 and 1986, only five persons age 15 or younger were sentenced to death in the United States, leading the Court to conclude that, "these five young offenders have received sentences that are 'cruel and unusual in the same way that being struck by lightning is cruel and unusual.'" ***Id.* at 833, *quoting, Furman v. Georgia*, 408 U.S. 238, 309 (1972)** (quoting Stewart, J., concurring).

c. National and International Views. As a part of its discussion of legislation, the Supreme Court considered the views of respected national religious, social, and professional organizations, including the American Bar Association ("ABA") and the American Law Institute, both of which it said "have formally expressed their opposition to the death penalty for juveniles." ***Id.* at 830**. And, stating that it had "previously recognized the relevance of the views of the international community in determining whether a punishment is cruel and unusual," ***id.* at 830 n.31** (citations omitted), the Court also considered the sentencing practices of European and other countries, stating:

> Although the death penalty has not been entirely abolished in the United Kingdom or New Zealand (it has been abolished in Australia, except in the State of New South Wales, where it is available for treason and piracy), in neither of those countries may a juvenile be executed. The death penalty has been abolished in West Germany, France, Portugal, The Netherlands, and all of the Scandinavian countries, and is available only for exceptional crimes such as treason in Canada, Italy, Spain, and Switzerland. Juvenile executions are also prohibited in the Soviet Union.

***Id.* at 831-31** (footnote omitted).

d. Independent Analysis. Lastly, ***Thompson*** analyzed the culpability of juveniles as compared to adults and considered whether application of the death penalty to juveniles measurably contributed to the social purposes it was intended to serve. After noting "broad agreement on the proposition that adolescents as a class are less mature and responsible than adults" and "the special mitigating force of youth," the Court concluded that "less culpability should attach to a crime committed by a juvenile." ***Id.* at 834-35**. As to the social rationales of the death penalty - retribution and deterrence - it found them unacceptable for 15-year-old offenders because of the "lesser culpability of the juvenile offender" and because deterrence would not be jeopardized if the execution of those under 16 were prohibited. ***Id.* at 836-37**.

In light of all of these factors, ***Thompson*** concluded that a national consensus existed that execution of persons under 16 at the time of their crimes constituted cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. ***Id.***

2. Stanford v. Kentucky. The following year, in ***Stanford*, 492 U.S. 361**, Justice Scalia stated in the principal opinion that, by contrast, the Eighth and Fourteenth Amendments did not prohibit imposition of the death penalty for crimes committed at age 16 or 17. ***Id.* at 370-77**. In so holding, Justice Scalia agreed that what constitutes cruel and unusual punishment must be determined by current standards rather than by those in effect in 1789. ***Id.*** But, he said, current standards are almost entirely to be determined by reference to "statutes passed by society's elected representatives," ***id.* at 370**, and specifically by state legislatures. He then noted that, while the majority of states did not permit the execution of juvenile offenders, that count included the fourteen states that then barred capital punishment altogether. ***Id.* at 370 n.2**. If one considered only those states permitting capital punishment, then the majority of that subgrouping approved the execution of those who were 16 or 17 at the time of their offense. ***Id.* at 370**.

And, although ***Stanford*** recognized that juries sentence substantially fewer juveniles than adults to death, it said this did not provide a reason to prohibit such death sentences entirely. ***Id.* at 373-74.** ***Stanford*** also rejected, as irrelevant, the many state statutes barring those under 18 years old from

engaging in various activities, such as voting, drinking, or driving. ***Id.* at 374-77**. Similarly, although a year earlier ***Thompson*** had said the views of social, professional, and religious groups, as well as the sentencing practices of other countries, were relevant to determining current standards of decency, ***Stanford*** stated that the views of national organizations were an "uncertain foundation" on which to base constitutional law and that *international* practices were simply irrelevant to whether a *national* consensus existed. ***Id.* at 369 n.1, 377**. After so limiting its inquiry, ***Stanford*** concluded that there was no national consensus against executing offenders who were 16 or 17 at the time of the offense. ***Id.* at 370-72, 379-80**.

B. From Penry to Atkins: Development of a National Consensus Against Execution of the Mentally Retarded.

1. ***Penry v. Lynaugh***. The same day that the Supreme Court held in ***Stanford*** that there was no national consensus against imposition of the death penalty on juveniles, it held in ***Penry*, 492 U.S. 302**, an opinion authored by Justice O'Connor, that there was also no national consensus against imposition of the death penalty on the mentally retarded. Like ***Thompson*** and ***Stanford*, *Penry*** recognized that what constitutes cruel and unusual punishment is not a static concept, immutably tied to what punishments would have been included within the reach of the Eighth Amendment when the Bill of Rights was adopted in 1789. ***Id.* at 330**. Rather, the "prohibition against cruel and unusual punishments also recognizes the 'evolving standards of decency that mark the

progress of a maturing society.'" ***Id.* at 330-31, *quoting, Trop*, 356 U.S. at 101**. And, like ***Stanford*, *Penry*** looked to statutes passed by state legislatures as the best type of "objective evidence of how our society views a particular punishment today." ***Id.* at 331**. ***Penry*** also said that the Court "looked to the data concerning the actions of sentencing juries." ***Id.***

a. Legislative Action. When ***Penry*** was decided in 1989, only Georgia, Maryland, and the federal government had statutes barring the imposition of the death penalty on the mentally retarded. ***Id.* at 334**. The Supreme Court concluded that "the two state statutes prohibiting execution of the mentally retarded, even when added to the 14 States that have rejected capital punishment completely, do not provide sufficient evidence *at present* of a national consensus." ***Id.*** (emphasis added).

b. Other Factors. Mr. Penry was unable to provide evidence that juries chose not to sentence mentally retarded defendants to death. In addition, on the record before it, the Supreme Court said it could not conclude that "all mentally retarded people, by definition, can never act with the level of culpability associated with the death penalty." ***Id.* at 338-39**. For these reasons, the Court determined that "at present, there is insufficient evidence of a national consensus against executing mentally retarded people convicted of capital offenses for us to conclude that it is categorically prohibited by the Eighth Amendment." ***Id.* at 335**.

2. ***Atkins v. Virginia***. In 2002, the Supreme

Court revisited the issue of capital punishment of the mentally retarded in the case of Daryl Atkins, an allegedly mentally retarded man whose death sentence had been affirmed by the Virginia Supreme Court based on ***Penry***'s determination that there is no national consensus against the execution of the mentally retarded. In a principal opinion by Justice Stevens, the Supreme Court reversed Mr. Atkins' death sentence and remanded for a determination of his mental status. ***Atkins*, 536 U.S. 304**. In so holding, ***Atkins*** reaffirmed that whether capital punishment is barred for certain classes of offenders is necessarily part of a fluid, rather than a static, process and that as our standards of decency evolve, so will the determination of what constitutes cruel and unusual punishment. ***Id.* at 312**.

Atkins' analysis more closely resembles that in ***Thompson*** than that in ***Stanford***. ***Atkins***: (a) first looked at the objective evidence of legislative intent provided by state legislation barring the death penalty. (b) Like ***Penry***, it considered the frequency with which the death penalty was imposed on the mentally retarded. (c) It then looked to the opinions of national professional, religious, and social organizations, and the approach of other countries to the death penalty for the mentally retarded. (d) Finally, it undertook an independent examination of whether the imposition of the death penalty on the mentally retarded constitutes cruel and unusual punishment under today's evolving standards of decency. ***Id.* at 313**.

a. Legislative Action. ***Atkins*** found that, in the thirteen years after ***Penry***, fourteen more states -

including Missouri - had adopted legislation barring the application of their death penalty laws to the mentally retarded. And, while New York and Nebraska had each reinstated the death penalty, each had specifically exempted the mentally retarded from the reach of those newly enacted statutes. ***Id.* at 314-15**. When these sixteen new states were added to the two states that had already adopted such legislation in 1989, eighteen states, and the federal government, then prohibited imposition of the death penalty on the mentally retarded. ***See id***. In addition, the Court noted that the Texas legislature had unanimously adopted a bill barring the execution of the mentally retarded, but the bill was vetoed by the governor on other grounds, and that at least one house of the Virginia and Nevada legislatures had similarly adopted bills barring the death penalty for the mentally retarded. ***Id.* at 315**.[4]

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[4]In footnote 18, ***Atkins*** contrasted these substantial legislative changes with the fact that, since ***Stanford***, "apparently only two state legislatures have raised the threshold age for imposition of the death penalty" for juveniles, but did not purport to present a complete picture of the legislative activity on the juvenile death penalty since ***Stanford***, an issue not then before it. ***Atkins*, 536 U.S. at 316 n.18** (citations omitted). As discussed *infra*, eleven states and the federal government already barred the death penalty for juveniles when ***Stanford*** was decided, two have done so since, others are considering doing so, two other legislatures have enacted statutes that do not permit execution of those under 18, and the state of Washington has barred juvenile executions by court decision. It is noteworthy that twelve additional states and the District of Columbia bar executions altogether.

While the number of states barring imposition of the death penalty had clearly grown impressively, the Court stated that, "*It is not so much the number of these States that is significant, but the consistency of the direction of change.*" ***Id.*** (footnote omitted) (emphasis added). This consistency was further reflected by the fact that, since ***Penry***, no state had adopted a law permitting the execution of the mentally retarded. ***Id.* at 315-16**. The Court found such consistency particularly persuasive given the anticrime atmosphere of the times:

> Given the well-known fact that anticrime legislation is far more popular than legislation providing protections for persons guilty of violent crime, the large number of States prohibiting the execution of mentally retarded persons (and the complete absence of States passing legislation reinstating the power to conduct such executions) provides powerful evidence that today our society views mentally retarded offenders as categorically less culpable than the average criminal.

Id.

b. Frequency of Imposition of Death Penalty. The Court found that some states, such as New Hampshire and New Jersey, whose statutes nominally authorize the execution of mentally retarded persons, had not carried out executions of any persons in decades, thus removing the incentive to pass legislation barring execution of the mentally retarded

in particular. ***Id.* at 316**. And, in those states that still carried out executions, the Court found, the practice of executing mentally retarded offenders had become very uncommon: only five persons who were known to have an I.Q. of less than 70 had been executed in the thirteen years since ***Penry***. ***Id.*** The Court concluded that "[t]he practice. . . has become truly unusual, and it is fair to say that a national consensus has developed against it." ***Id.***

c. National and International Opposition to Death Penalty. ***Atkins*** stated that the consensus against the death penalty for the mentally retarded was evident not only from the legislation passed over the prior thirteen years, and the rareness of the application of the death penalty in those states that permitted its use, but also from the opposition to the practice from experts in the field, noting "several organizations with germane expertise have adopted official positions opposing the imposition of the death penalty upon a mentally retarded offender," including the American Psychological Association and the American Association of Mental Retardation. ***Id.* at 316 n.21**. The Court also found the sentiments of this nation's religious communities, and of the world community, to be overwhelmingly opposed to execution of the mentally retarded. ***Id.*** Finally, the Court cited to polling data that showed "a widespread consensus among Americans, even those who support the death penalty, that executing the mentally retarded is wrong." ***Id.***. While the Court stated that the opposition of these groups was by no means dispositive, the Court did find significant their "consistency with the legislative evidence," stating that it provided "further

support to [the Court's] conclusion that there is a consensus among those who have addressed the issue." ***Id.***

d. Independent Judicial Determination. Finally, the Supreme Court undertook an independent evaluation of whether such executions should be prohibited. It found that neither the retributive nor the deterrence justifications for the death penalty would be furthered by executing the mentally retarded, stating, "If the culpability of the average murderer is insufficient to justify the most extreme sanction available to the State, the lesser culpability of the mentally retarded offender surely does not merit that form of retribution." ***Id.* at 319.**[5] It further concluded, "the same cognitive and behavioral impairments that make [mentally retarded] defendants less morally culpable . . . also make it less likely that they can process the information of the possibility of execution as a penalty and, as a result, control their conduct based upon that information." ***Id.* at 320**.

The Court further implicitly rejected the suggestion in ***Penry*** that the death penalty could not be barred if any mentally retarded person might theoretically deserve it, so that the effect of mental retardation should instead simply be considered as a mitigating factor. ***Id.* at 318-19**. Rather, it said, the very fact that persons are mentally retarded not only

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[5]In ***Godfrey v. Georgia*, 446 U.S. 420 (1980)**, the Supreme Court set aside a death sentence because the petitioner's crimes did not reflect "a consciousness materially more 'depraved' than that of any person guilty of murder." ***Id.* at 433**.

makes them more likely to give a false confession, but also makes them less able to assist their counsel, typically makes them poor witnesses, and may cause them to exhibit a demeanor that is unsympathetic and that may incorrectly imply a lack of remorse. ***Id.* at 320-21**. Its independent evaluation led the Court to conclude that "death is not a suitable punishment for a mentally retarded criminal." ***Id.* at 321**.

II. APPLICATION OF THE PRINCIPLES SET OUT IN ATKINS, THOMPSON, PENRY, AND STANFORD TO THE EXECUTION OF JUVENILES TODAY

A. Stanford Does Not Preclude This Court from Considering Whether a National Consensus Now Exists Barring the Death Penalty for Juveniles.

The state argues, and the dissenting judges would hold, that whatever the Supreme Court held in ***Atkins*** is irrelevant to the instant case because this Court is bound by ***Stanford*** to hold that there is no constitutional bar to the execution of persons who were 16 or 17 years of age at the time of their crimes. This argument ignores the fundamental premise on which ***Stanford***, as well as ***Thompson, Penry,*** and ***Atkins***, were based: that "this Court has not 'confined the prohibition embodied in the Eighth Amendment to 'barbarous' methods that were generally outlawed in the 18th century,' but instead has interpreted the Amendment 'in a flexible and dynamic manner.'" ***Stanford*, 492 U.S. at 369, *quoting*, *Gregg v. Georgia*, 428 U.S. 153, 171 (1976)**. Court should be

guided by the conceptions of decency of "modern American society as a whole." ***Id***. (footnote omitted).

Atkins recently reaffirmed that decisions as to standards of decency are to be decided by current standards, not ones of years ago. ***Atkins*, 536 U.S. at 312**. And, that is just what the issue before this Court requires us to do: determine whether the evolving national consensus bars the imposition of the death penalty on juveniles today, even though it did not bar it fourteen years ago. To say that this determination must be made based on the state of the law and standards that existed when ***Stanford*** was decided in 1989, and that to do otherwise is to overrule ***Stanford***, is simply incorrect. This Court clearly has the authority and the obligation to determine the case before it based on current - 2003 - standards of decency. ***See Patterson v. Texas*, 536 U.S. 984, 985, 123 S.Ct. 24, 24 (2002)** (Ginsburg, J. dissenting from denial of petition for writ) ("This Court's decision in *Atkins v. Virginia 536 U.S. 304 (2002)*, made it tenable for a petitioner to urge reconsideration of *Stanford v. Kentucky*, 492 U.S. 361 (1989) . . . ."); ***In Re Stanford*, 537 U.S. ___, 123 S.Ct. 472 (2002)** (Stevens, J. dissenting from denial of petition for writ) (Court should reconsider *Stanford* in light of *Atkins* because "even if we were not convinced in 1989 [that juveniles should not be subject to the death penalty] we should be all the more convinced today" because of the additional states barring such executions and because of the growth in scientific knowledge of the less than

fully developed nature of the adolescent brain.).[6]

B. A National Consensus Against the Juvenile Death Penalty.

As the discussion of ***Thompson*, *Stanford*, *Penry*,** and ***Atkins*** makes evident, many of the same principles and factors that have guided the Supreme Court's determination of the constitutionality of the death penalty for the mentally retarded have also guided the Supreme Court's determination of the constitutionality of the death penalty for juveniles. This Court therefore will use ***Atkins***' approach in addressing whether a national consensus has developed against the juvenile death penalty since ***Stanford***, looking at: (1) the extent of legislative action against or in favor of the juvenile death penalty;

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[6]The dissent's suggestions that this Court should infer that the Supreme Court would not apply the ***Atkins*** principles to the juvenile execution context because the Supreme Court has denied petitions for writs in ***Patterson*, *Stanford***, and similar cases involving juveniles itself ignores the fact that the Supreme Court "has rigorously insisted that such a denial carries no implication whatever regarding the Court's views on the merits of the case which it has declined to review. The Court has said this again and again; again and again the admonition has to be repeated." ***Maryland v. Baltimore Radio Show*, 338 U.S. 912, 919 (1950)**; ***see also Teague v. Lane*, 489 U.S. 288, 296 (1989)** (because a variety of considerations underlie the denial of a writ, such denials should be accorded no precedential value). ***Cf. Rodriguez v. Suzuki Motor Corp.*, 996 S.W.2d 47, 61 (Mo. banc 1999)** (denial of petition for writ is not a conclusive decision on the merits of the issue presented).

(2) the frequency of the imposition of the death penalty on juveniles in modern times, and the frequency with which it is carried out even when imposed; (3) national and international opinion on the juvenile death penalty; and (4) an independent examination of whether the death penalty for juveniles violates evolving standards of decency and so is barred by the Eighth and Fourteenth Amendments.

1. Legislative Action Has Consistently Been Against the Juvenile Death Penalty. At the time that ***Penry*** was decided in 1989, only two states had outlawed executing the mentally retarded, and the Supreme Court found that this was not sufficient to constitute a national consensus. In deciding that developments of the intervening years between ***Penry*** and ***Atkins*** demonstrated that a national consensus had developed against executing the mentally retarded, ***Atkins*** relied heavily on the fact that sixteen more state legislatures had barred execution of the mentally retarded, while no additional states had permitted it. It found this persuasive not principally because of the number of states that had passed such laws, but because of the consistency of the changes in the direction of opposition to the death penalty for the mentally retarded.

That same consistency of change has been shown in opposition to the juvenile death penalty. Indeed, the change was in the process of occurring when ***Stanford*** was decided. At the time of ***Stanford***, eleven states barred the juvenile death penalty. This was substantial, but not yet enough to constitute a national consensus.

Since ***Stanford***, however, and despite what ***Atkins*** called the popularity of "law and order" legislation, five more states have banned the practice of executing juvenile offenders. Two have done so by adopting legislation raising the age of execution to 18,[7] and two have done so by newly reinstating the death penalty, but only for those offenders who were 18 or older at the time of their offense.[8] The Washington Supreme Court has also held that its death penalty statute cannot be construed to authorize imposition of the death penalty for crimes committed by juvenile offenders,[9] thereby adding the state of Washington to the list of states in which the practice is now prohibited. Thus, a total of sixteen states - to which should be added federal civilian and military courts - require a minimum age of 18 for imposition of the death penalty, only two fewer than the eighteen states ***Atkins*** identified as prohibiting execution of the mentally retarded.[10] If the twelve states and the

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[7]Indiana (S. 426, 112th Leg., Reg. Sess., 2002 In. Laws) and Montana (H.B. 374, 1999 Leg., Reg. Sess., 1999 Mt. Laws).

[8]Kansas (Kan. Crime. Code Ann. sec. 21-46622 (Vernon 2001)) and New York (N.Y. Crim. Proc. Law sec. 400.27 (McKinney 2002)).

[9]***See State of Washington v. Furman*, 858 P.2d 1092, 1102-03 (Wash. 1993).**

[10]While, as noted in footnote 18 of ***Atkins***, this means there were many fewer states that raised their minimum age of execution to 18 after ***Stanford*** than there were states that barred the death penalty for the mentally retarded after ***Penry***, this in part reflects the fact that eleven states had already acted to bar

District of Columbia that bar the death penalty entirely are added, the combined total is twenty-eight states that prohibit juvenile executions - two fewer than the thirty states that prohibited execution of the mentally retarded at the time ***Atkins*** was decided.

Moreover, as is the case with the mentally retarded, the change has consistently been in the same direction. No state since ***Stanford*** has lowered the age for execution from 18 to 17 or 16, although ***Stanford*** allowed states to do so.[11] Rather, the minimum age has either stayed the same or been raised, and the only two states to reinstate the death penalty since 1989 did so only for those 18 or older. In addition, many states, including Missouri, have recently considered legislation to raise the minimum age for executions to 17 or 18. **Streib, *supra*., at 7.** This accounts for the most legislative attention to the issue in twenty years. ***Id***. In 2000, a bill to abolish the death penalty in New Hampshire passed both houses

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the juvenile death penalty before ***Stanford*** was even decided. It would be the ultimate in irony if the very fact that the inappropriateness of the death penalty for juveniles was broadly recognized sooner than it was recognized for the mentally retarded were to become a reason to continue the execution of juveniles now that the execution of the mentally retarded has been barred.

[11]Victor L. Streib, *The Juvenile Death Penalty Today: Death Sentences and Executions for Juvenile Crimes*, January 1, 1973-June 30, 2003, at 7, *available at* http://www.law.onu.edu/faculty/streib/juvdeath (last modified July 1, 2003).

of the state legislature, but was vetoed.[12]

2. Infrequency of Imposition of Death Penalty. In ***Atkins***, the Supreme Court also found persuasive the fact that execution of the mentally retarded had become truly unusual. Many states that nominally had the death penalty on their books no longer imposed it at all or had never imposed it on a mentally retarded person, and only a total of five persons known to be mentally retarded had been executed in the United
States in the thirteen years following the Court's decision in ***Penry***. ***Atkins*, 536 U.S. at 316**.

The practice of executing those under 18 has become similarly uncommon today. Although twenty-two states theoretically permit the death penalty for juveniles, only six (Missouri, Texas, Virginia, Georgia, Oklahoma, and Louisiana) have actually executed a juvenile offender since ***Stanford*** was decided fourteen years ago. **Streib, *supra*, at 3-4**. Of these six states, only three have executed juvenile offenders since 1993 - Texas, Virginia, and Oklahoma. ***Id*. at 4**. Louisiana last executed a juvenile offender in 1990; Georgia in 1993. ***Id*. at 3**. Missouri executed Frederick Lashley in 1993. That is the only officially recorded execution of a juvenile offender in Missouri since the state took over executions from Missouri's counties in 1937.[13]

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[12]HB 1548 (N.H. 2000).

[13]According to one authority, the only other juvenile execution in Missouri occurred in 1921. American Bar Association, *Cruel and Unusual Punishment: The Juvenile Death Penalty*, Spring

Perhaps most telling is that, while at least 366 juvenile offenders have been executed in this country since 1642 (when the first juvenile offender execution occurred), only twenty-two of the 366 were carried out during the current era (1973-2003). ***Id.*** Of these twenty-two executions, Texas, Virginia, and Oklahoma together account for eighty-one percent of the juvenile executions. ***Id.* at 5**. Although Alabama, Arizona, Arkansas, Delaware, Idaho, Kentucky, Mississippi, Nevada, Pennsylvania, South Dakota, Utah, and Wyoming all theoretically permit the death penalty for 16-year-olds, and while Florida, New Hampshire, and North Carolina theoretically permit it for 17-year-olds, none of these states has executed a juvenile since the death penalty was re-established in 1976. ***Id.* at 3-4, 6**. All but South Dakota and New Hampshire, however, have executed other offenders during that period.[14] Indeed, even where juries have imposed a death sentence on a juvenile since the reinstatement of the death penalty in 1976, its application has consistently been reversed by the courts on a variety of grounds, making South Carolina the only other state (other than Texas, Louisiana, Missouri, Georgia, Virginia, and Oklahoma) to carry out a juvenile

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2003, at 2, *available at* http://www.abanet.org/crimjust/juvjus/-factsheets_evolving_standards.pdf (last visited Aug. 1, 2003).

[14]These and other statistics about executions are collected by the Death Penalty Information Center and can be found at www.deathpenaltyinfo.org. ***See also*** statistics collected at http://www.asc41.com/policypaper2.html by the American Society of Criminology.

execution since 1976. ***Id.* at 3**. As the chart attached as Appendix A graphically demonstrates, more mentally retarded persons than juveniles have been executed, in more states, since the death penalty was reinstated in 1976.[15]

As ***Atkins*** noted in regard to the mentally retarded, in light of the small number of executions of juvenile offenders carried out in the last decade, legislatures in states with a juvenile death penalty may have seen little reason to pass legislation barring it. Juveniles are so seldom executed that, other than perhaps in Texas and Virginia, the death penalty for juveniles has become so truly unusual that its potential application is more hypothetical than real.

But, the likelihood of such an execution is not hypothetical in Missouri today. The state argues that Missouri should become the only state other than Texas, Virginia, and now Oklahoma to carry out more than one juvenile execution since the reinstatement of the death penalty in 1976.

3. National and International Consensus. Opposition to the juvenile death penalty by professional, social, and religious organizations has been longstanding. At the time ***Stanford*** was decided, a large number of groups, including the ABA, child advocacy groups, psychiatric organizations, and church

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[15]ABA Juvenile Justice Center, *Comparison: Executions of Juveniles and Mentally Retarded Persons by State Since 1976* (Feb. 20, 2003), *at* http://www.abanet.org/crimjust/juvjus/juvandmr.pdf.

and religious groups filed amicus briefs urging an end to such executions.[16] Since ***Stanford***, additional organizations of professionals have also called for an end to the death penalty, including: The American Psychiatric Association, The American Academy of Child and Adolescent Psychiatry, The National Mental Health Association, The National Center for Youth Law, The Coalition for Juvenile Justice, The American

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[16]***Stanford*** cited the following list of organizations, all of which filed briefs *amicus curiae* in support of the petitioners in ***Stanford***: American Bar Association; Child Welfare League of America; National Parents and Teachers Association; National Council on Crime and Delinquency; Children's Defense Fund; National Association of Social Workers; National Black Child Development Institute; National Network of Runaway and Youth Services; National Youth Advocate Program; and American Youth Work Center; American Society for Adolescent Psychiatry and American Orthopsychiatric Association; Defense for Children International - USA; National Legal Aid and Defender Association; and National Association of Criminal Defense Lawyers; Office of Capital Collateral Representative for the State of Florida; International Human Rights Law Group; American Baptist Churches; American Friends Service Committee; American Jewish Committee; American Jewish Congress; Christian Church (Disciples of Christ), Mennonite Central Committee; General Conference Mennonite Church; National Council of Churches; General Assembly of the Presbyterian Church; Southern Christian Leadership Conference; Union of American Hebrew Congregations; United Church of Christ Commission for Racial Justice; United Methodist Church General Board of Church and Society; and United States Catholic Conference; West Virginia Council of Churches; and Amnesty International. ***Stanford*, 492 U.S. at 388 n.4** (Brennan, J. dissenting).

Humane Association, and The Constitutional Project (a bipartisan nonprofit organization that seeks consensus on controversial legal and constitutional issues).

Additional groups of faith also have issued statements in opposition to the death penalty, including: American Baptist Churches in the USA, American Ethical Union, American Friends Service Committee, American Jewish Committee, Amnesty International, The Bruderhof Communities, Central Conference of America, Christian Church (Disciples of Christ), Church of the Brethren, Church Women United, The Episcopal Church, Evangelical Lutheran Church in America, Fellowship of Reconciliation, Friends Committee on National Legislation, Friends United Meeting, General Conference of General Baptists, General Conference Mennonite Church, The Mennonite Church, The Moravian Church in America, YMCA of the USA, Mormans for Equality and Social Justice, The Orthodox Church in America, National Council of the Churches of Christ, Presbyterian Church (USA), The Rabbinical Assembly, Reorganized Church of Jesus Christ of Latter Day Saints, Reformed Church in America, Unitarian Universalist Association, Union of American Hebrew Congregations, United Methodist Church, United Church of Christ, and United States Catholic Conference.[17] A recent poll found that only thirty-four percent of Missourians support the death

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[17]These groups have set out their views on a web site that can be found at www.deathpenalty religious.org/education.

penalty for juveniles.[18]

While ***Stanford*** found the opposition of social, professional, and religious groups to be of little importance, the Court's more recent decision in ***Atkins*** clearly demonstrated a shift back to reliance on such evidence to confirm the national consensus that evolving standards of decency proscribe imposition of the death penalty on the mentally retarded. ***Atkins*, 536 U.S. at 316 n.21**.

Similarly, here, although by no means dispositive, we find the opposition to the juvenile death penalty of the wide array of groups within the United States listed above to be consistent with the legislative and other evidence that current standards of decency do not permit the imposition of the death penalty on juveniles. We also find of note that the views of the international community have consistently grown in opposition to the death penalty for juveniles. Article 37(a) of the United Nations Convention on the Rights of the Child and several other international treaties and agreements expressly prohibit the practice. **Streib, *supra*, at 7**. According to Amnesty International, officially sanctioned executions of juveniles have occurred in only two other countries in the world in the last few years, Iran and The Republic of the Congo (DRC). **Amnesty International, *Juveniles: The Death Penalty Gives up on***

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[18]Juvenile Offender Public Opinion Survey, Center for Advanced Social Research, University of Missouri-Columbia (Mar. 2003), *available at* http://www.abanet.org/crimjust/juvjus/mopoll.pdf.

Juvenile Offenders (July 28, 2003), *at* **http://www.amnestyusa.org/abolish/juveniles**. Of the last seven juvenile offender executions, five occurred in the United States. **Streib, *supra*, at 7**.

4. Independent Examination of Death Penalty. ***Atkins*** also undertook an independent analysis of whether the death penalty was warranted for mentally retarded offenders by examining whether the social purposes intended to be served by the death penalty, retribution and deterrence, applied to mentally retarded offenders. ***Atkins*, 536 U.S. at 318-19**. The Supreme Court found that neither purpose would be furthered by executing the mentally retarded, as such individuals are inherently less culpable than other actors and less able to deliberate about their actions and, thus, are less able to be deterred by awareness that their crime could result in death. ***Id.* at 319-21**. Further, ***Atkins*** found that it was necessary to categorically exclude the mentally retarded from execution, rather than allowing their mental capacity to be considered on a case-by-case basis, because their reduced mental capacity would increase the possibility of false confessions and reduce their ability to show mitigation or assist counsel, so that "[m]entally retarded defendants in the aggregate face a special risk of wrongful execution." ***Id.* at 321.** Lastly, it concluded: "As *Penry* demonstrated . . . reliance on mental retardation as a migrating factor can be a two-edged sword that may enhance the likelihood that the aggravating factor of future dangerousness will be found by the jury." ***Id.***

Similarly, as to juveniles, neither retribution nor

deterrence provides an effective rationale for the imposition of the juvenile death penalty, and the risk of wrongful execution of juveniles is enhanced for reasons similar to that set out in ***Atkins*** in regard to the mentally retarded. While the parties have cited this Court to numerous current studies and scientific articles about the structure of the human mind, the continuing growth of those portions of the mind that control maturity and decision-making during adolescence and young adulthood, and the lesser ability of teenagers to reason, this Court need not look so far afield. The Supreme Court recognized the lesser culpability and developing nature of the adolescent mind in its 1988 decision in ***Thompson*, 487 U.S. at 835**, in which it stated, "there is also broad agreement on the proposition that adolescents as a class are less mature and responsible than adults," ***id*, at 834**, and therefore "less culpability should attach to a crime committed by a juvenile than to a comparable crime committed by an adult." ***Id.* at 835**. ***Thompson*** noted that it was not the first time that the Court had been called upon to recognize the lesser culpability of the young, for in ***Eddings v. Oklahoma*, 455 U.S. 104, 115-16 (1982)**:

> We stressed this difference in explaining the importance of treating the defendant's youth as a mitigating factor in capital cases: "But youth is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage. Our history is replete with laws and judicial recognition

> that minors, especially in their earlier years, generally are less mature and responsible than adults. Particularly 'during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment' expected of adults . . . ."

Thompson*, 487 U.S. at 834.** ***Thompson then stated:

> Thus, the Court has already endorsed the proposition that less culpability should attach to a crime committed by a juvenile than to a comparable crime committed by an adult. The basis for this conclusion is too obvious to require extended explanation. Inexperience, less education, and less intelligence make the teenager less able to evaluate the consequences of his or her conduct while at the same time he or she is much more apt to be motivated by mere emotion or peer pressure than is an adult.

Id.* at 835** (footnotes omitted). ***Thompson concluded, "The reasons why juveniles are not trusted with the privileges and responsibilities of an adult also explain why their irresponsible conduct is not as morally reprehensible as that of an adult." ***Id***. Although Mr. Simmons is 17 rather than 15, he is still an adolescent, and this Court finds the rationales set forth in

Thompson and ***Eddings*** apply here.[19]

Similarly, the deterrence function of the death penalty can have little application to juveniles, not just because of their lesser ability to reason and their lack of informed judgment, but because, as discussed *supra*, the imposition of the death penalty on 16-year-olds and 17-year-olds has become so unusual in the last decade that "the likelihood that the teenage offender has made the kind of cost-benefit analysis that attaches any weight to the possibility of execution is so remote as to be virtually non-existent." ***Thompson*, 487 U.S. at 837** (discussing effect of infrequency of executions of those 15 and younger).

Finally, as Mr. Simmons notes, the risk of wrongful execution also is greater as to younger offenders, who have had less time to develop ties to the community, less time to perform mitigating good works, and less time to develop a stable work history, than is true of adult offenders, and who are far more likely than adults to waive their rights and to give false confessions. Moreover, although nominally under Missouri law defendants are permitted to use their youth as a mitigating factor, this case provides a graphic illustration of the fact that their youth can become a further argument against them. In closing argument in Mr. Simmons' case, the state argued that the jury should not let him use his age to protect himself because if it did so, then he "wins." The state

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[19]***Stanford*** did not find these rationales inapplicable to those 16 or 17 at the time of their crime, but instead found these issues irrelevant.

then argued, "Think about age. Seventeen years old. Isn't that scary. Doesn't that scare you? Mitigating? Quite the contrary I submit. Quite the contrary." Thus, Mr. Simmons' youth was used to suggest greater immorality and future dangerousness and so to provide a further reason to impose the death penalty.

For these reasons, this Court concludes that the Supreme Court of the United States would hold that the execution of persons for crimes committed when they were under 18 years of age violated the "evolving standards of decency that mark the progress of a maturing society," and is prohibited by the Eighth Amendment to the United States Constitution as applied to the states through the Fourteenth Amendment.[20]

IV. CONCLUSION

For the reasons set out above, this Court sets aside Mr. Simmons' death sentence and re-sentences him, pursuant to the Court's authority under Sec. 565.035 RSMo 2000, to life imprisonment without eligibility for probation, parole, or release except by act of the Governor.

Laura Denvir Stith, Judge

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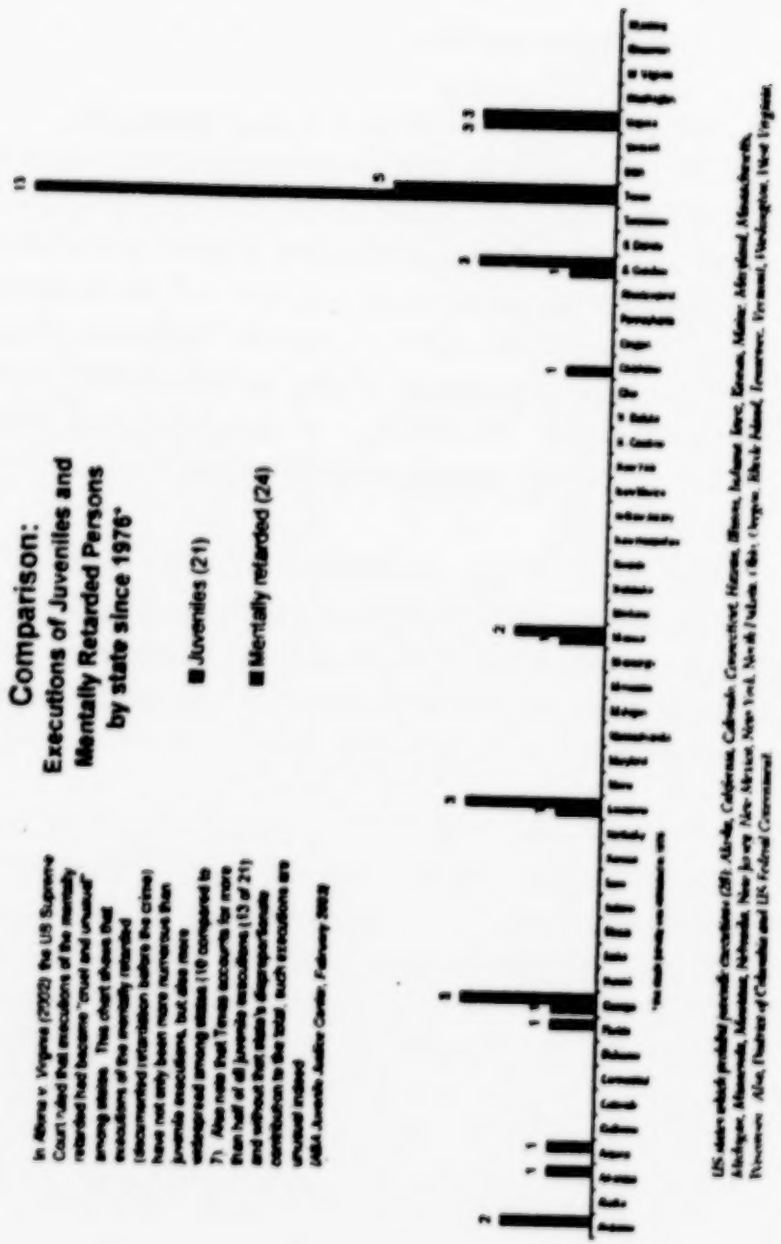
[20]Because the Eighth and Fourteenth Amendments afford Mr. Simmons relief, this Court need not reach Mr. Simmons alternative argument that, even if his execution is not barred by the Eighth Amendment, it is barred by article 1, section 21 of the Missouri Constitution.

White, C.J., Wolff and Teitelman, JJ., concur; Wolff, J., also files separate concurring opinion; Price, J., dissents in separate opinion filed; Benton and Limbaugh, JJ., concur in opinion of Price, J.



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SUPREME COURT OF MISSOURI

en banc

State ex rel. Christopher Simmons,	)	
Petitioner,	)	
vs.	)	**No. SC84454**
Donald P. Roper, Superintendent, Potosi Correctional Center,	)	
Respondent.	)	

CONCURRING OPINION

I concur in the principal opinion and in its holding that the Eighth Amendment's prohibition of cruel and unusual punishments bars the execution of those who were younger than 18 when their crimes were committed.

Both the principal opinion and the dissent strive earnestly to follow relevant precedent of the United States Supreme Court - whether that be the line of reasoning in *Atkins v. Virginia*, 536 U.S. 304 (2002), or the result in *Stanford v. Kentucky*, 492 U.S. 361 (1989). That Court's views may be as divided as this Court's. The underlying premise of both views is that the constitution forbids the execution of a person who, at the time of the crime, was not fully capable of the kind

of adult moral judgment that would hold the offender subject to the death penalty for his crime.

The use of chronological age in making these judgments - as the Court did in *Stanford* and in *Thompson v. Oklahoma*, 487 U.S. 815 (1988) - invites the drawing of a bright line as to the age at which a murder defendant may be subject to the death penalty.

The legislature has drawn the line for eligibility for the death penalty at age 15. Section 565.020.2.[1] The age-15 standard is consistent with *Thompson v. Oklahoma*, which held that a child who committed a crime when he was 15 or younger cannot receive the death penalty because of the Eighth Amendment's proscription of cruel and unusual punishments. Citing evolving standard, the principal opinion here holds that the line is now drawn at age 18.[2]

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[1]All references are to RSMo 2000 unless otherwise indicated. Section 565.020.2 provides that the death penalty may not be applied where the defendant "has not reached his sixteenth birthday at the time of the commission of the crime."

[2]In *Brennan v. State*, 754 So.2d 1 (Fla. 1999), where the Florida Supreme Court held that 16-year-old defendants may not be subjected to the death penalty, Judge Anstead, specially concurring, wrote, "[s]omeone must draw these important lines, and in our unique framework of sharing governmental powers, this function of constitutional line-drawing has been assigned to the judicial branch." *Id.* at 12 n.15 (citing *Thompson v. Ok.*, 487 U.S. 815, 840 (1988)). Judge Anstead was aware of the arbitrariness that could result from such line drawing: "Inevitably, there will be cases where one day's difference in

What is the nature of this judicial or legislative judgment? When any given age is used, it reflects a judgment that those below that age cannot be fully responsible in terms of being subject to the death penalty. The line is drawn because of the judgment that most if not all persons of such a youthful age are not morally capable of being fully responsible for their acts. This is true even though a child less than 18 may be tried as an adult, found guilty, and receive an adult non-capital sentence. *See* section 211.071.

The legislature traditionally has drawn lines by chronological age based on assumptions or experience as to maturity.[3] There is some judicial authority for deferring to the legislature in this regard even as to capital punishment of those of a certain age, *see Thompson v. Oklahoma*, 487 U.S. at 854 (1988) (O'Connor, J., concurring) ("I would not substitute our inevitably subjective judgment abut the best age at which to draw a line in the capital punishment context for the judgments of the Nation's legislatures."). The *Thompson* decision itself, however, stands for the proposition that line drawing in capital cases is a

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age will be the determinative factor between life and death." *Id.*

[3]*See* section 311.325 (setting the minimum drinking age at 21); section 115.133 (setting the minimum voting age at 18); section 431.061 (consent to surgical or medical treatment); section 431.056 (minors' capacity to enter into contracts); section 451.090 (minors' capacity to enter into marriage contract); section 302.060 (age one can obtain a driving license); section 474.310 (must be 18 to make a will); and section 494.425 (must be 21 to serve on a jury).

prerogative of the judiciary in its role of safeguarding Eighth Amendment rights.

Judges have long drawn lines by chronological age. The common law - judge-made law - has had a rich, if somewhat checkered history of recognizing age categories when it comes to criminal responsibility. Under the common law, a child who reached the age of 14 was fully responsible for crimes as an adult. Under the age of seven the common law determined that a person had no criminal capacity. Between the ages of seven and 14, there was a rebuttable presumption that the child lacked capacity to be criminally responsible for the child's acts. The common law placed the burden on the prosecution to rebut the presumption of incapacity. ROLLIN M. PERKINS, CRIMINAL LAW 837 (2d ed. 1969).

The common law, as Perkins has noted, has some grim examples: In the 13th century, a seven-year-old boy was tried for murder; his execution was "pardoned for the king's sake." *Id.* at 838. English records also show that a 13-year-old girl was executed for killing her mistress, a 10-year-old boy was executed for killing a companion, and an eight-year-old boy was similarly punished for "maliciously" burning some barns. *Id.* Perkins also notes that American records show the execution of two 12-year-old boys for murder. *Id.* The standards of decency, cited by the United States Supreme Court and by the principle opinion in this case, seem certainly to have evolved. *Atkins v. Virginia*, 536 U.S. 304 (2002). But evolved how far?

Missouri's death penalty statue states that the

jury, in determining whether or not to recommend the death penalty, can consider "age," but without elaborating how age is to be considered. Section 565.032.3(7). Despite the lack of elaboration in the statute, the jury is instructed to consider age as a mitigating factor. In this case, in the penalty phase final argument, the defense and the prosecution used Simmons' age in their arguments. In mitigation, the defense talked about 17-year-olds and their inability to think about the future, and about the fact that a person of 17 cannot vote or lawfully drink alcohol, but can be subject to the death penalty. The prosecutor used Simmons' age to argue that he should be put to death. The prosecutor's argument was: "Think about age. Seventeen years old. Isn't that scary? Doesn't that scare you? Mitigating? Quite the contrary I submit. Quite the contrary." The prosecutor seems to have implied that if Simmons was this bad at 17, he could only get worse.

The principal opinion draws a bright line based on the Eighth Amendment's prohibition of cruel and unusual punishments. However, if the Supreme Court of the United States does not agree with this Court's conclusion that the standard of decency has evolved to that point, the issue is certainly appropriate for a factual determination on a case-by-case basis. In that event, this Court may wish to take a cue from the statute's reference to age and borrow the "presumption" concept from the common law.

An updated version would be: A 16 or 17-year-old is presumed not to have the capacity to be fully responsible and, therefore, eligible for the death

penalty. In the penalty phase, the state could present evidence of the youthful defendant's full capacity, with the defense entitled to present evidence that the defendant was not fully responsible at the time of the crime so as to be eligible for the death penalty.[4] The state would have the burden of overcoming the presumption. The issue of responsibility, in the sense of eligibility for the death penalty, would become the subject of a jury finding, rather than a line drawn by the Court.

Using age as a bright line in juvenile death penalty cases involving 16 and 17 year-olds may be considered unreliable because age, standing alone, is not the true relevant factor as to why it is arguably unjust to impose the death penalty. "Rather, age is simply a 'proxy' for a combination of factors such as maturity, judgment, responsibility, and the capability to assess the possible consequences of one's conduct."

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[4]Courts often make decisions regarding the capacity of juveniles. For example, in certifying a juvenile to be tried as an adult, the youth's age, maturity and sophistication are considered. *State v. Thomas*, 70 S.W.3d 496, 501 (Mo. App. 2002); section 211.071.6. In *Thomas*, to evaluate whether the defendant, who was 16 at the time of the crime, should be tried as an adult, the chief juvenile officer prepared a report providing that the defendant "'appears to be of low average intelligence, responsive, . . . mature . . . appears to know the difference between right and wrong . . . appears to be sophisticated in his manner of living in that he makes his own decision.'" *Id.* To determine whether the defendant's capacity warrants the death penalty, evaluations similar to that performed for certification could be used.

Joseph L. Hoffmann, "On the Perils of Line Drawing: Juveniles and the Death Penalty," 40 HASTINGS L.J. 229, 258 (1989). Because age does not correspond perfectly to the combination of relevant factors, its use as a bright line produces "comparative injustice" - that is, some may be spared who are fully capable of receiving the death penalty and others executed who should have been found incapable.

The alternative is the adoption of presumptions with respect to the age of the murderer in capital cases.[5] In a case such as this one, where the defendant was a 17-year-old murderer, the Court could hold that persons below the age of 18 are presumed to lack sufficient maturity to be eligible for the death penalty. This presumption would be subject to rebuttal by the state, in which case the unusually mature 17-year-old murderer could receive the death penalty. Proof of

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[5]The dissenters in *Thompson v. Oklahoma* also may well have been open to individualized consideration when deciding whether to subject juvenile offenders to the death penalty. Justice Scalia wrote at the beginning of his dissenting opinion that, "[i]f the issue before us today were whether an automatic death penalty for conviction of certain crimes could be extended to individuals younger than 16 when they commit the crimes, thereby preventing individualized consideration of their maturity and moral responsibility, I would accept the plurality's conclusion that such a practice is opposed by national consensus . . . . I might even agree with the plurality's conclusion if the question were whether a person under 16 when he commits a crime can be deprived of the benefit of a rebuttable presumption that he is not mature and responsible enough to be punished as an adult." 487 U.S. 815, 859.

such capacity should be beyond a reasonable doubt.[6]

Individualized treatment in juvenile death penalty cases would preserve the capital sentencing option while eliminating or diminishing the comparative injustice problem associated with line-drawing governed solely according to a defendant's age.

If the Supreme Court of the United States does not agree that age 18 is where the line now should be drawn, the presumption suggested here should be adopted. This would not be based on the Eighth Amendment's ban on cruel and unusual punishments, but rather a state-law interpretation of the statute that makes "age" a factor in capital sentencing.[7]

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[6]It can be argued that the statutory line that bars execution of offenders who were under age 16 at the time of their offenses contains a presumption that those age 16 and above are eligible for the death penalty. The statutory reference to age, and the jury instruction that age be considered a mitigating factor, would place the burden on the young offender to rebut the statute's supposed presumption. However, establishing presumptions and burdens is traditionally a judicial function, though not exclusively so. In cases involving the death penalty, the judiciary's prerogative to establish presumptions and to assign the burdens of overcoming presumptions is a necessary part of the courts' duty to ensure that the death penalty is not wrongly imposed.

[7]Come to that, the presumption logically could be applied to those under 21. That is, after all, the age at which the legislature deems a person to be mature enough to pass judgment as a juror. Section 494.425. *But see, Stanford v.*

Requiring a specific jury finding on the youthful murderer's capacity would be consistent with this Court's over-all duty to ensure that a person lacking full capacity at the time of the crime not be subject to the death penalty.[8]

Kentucky, 492 U.S. at 374-377. However, the presumption against the death penalty seems better suited for those ages 16 and 17 than for those over age 18. The justification for the presumption is that the death penalty is not appropriate for most persons of a certain age and, thus, the state should have the burden of showing that the less probable case - that the particular offender is mature enough to be subject to the death penalty - is true. If most but not all of those over age 18 are suitable for the death penalty, then a defendant may appropriately have the burden of showing that, in his case, age is a sufficiently mitigating circumstance to avoid the death penalty.

[8]Another statutory basis for holding persons under the age of 18 ineligible for the death penalty may be found in the duty of ths Court to ensure proportionality under section 565.035.3(3) RSMo. 2000. This section requires this Court to determine whether "the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime, the strength of the evidence and *the defendant*." (emphasis added) As the principle opinion's historical analysis demonstrates, in the last decade the death penalty has rarely been imposed on persons under the age of 18. If the sentence of death for a murderer who is less than 18 years old is compared to other sentences of murderers who were the same age, the likelihood of an under-18 murderer receiving the death penalty approaches the likelihood of being struck by lightning. The death penalty for under-18 offenders would appear to be disproportionate.

This alternative should be used only if the Eighth Amendment's prohibition of cruel and unusual punishments is held not to bar execution of those who were younger than 18 when they committed their crimes. Because I believe the constitution does bar such executions, I concur in the principal opinion.

Michael A. Wolff, Judge

SUPREME COURT OF MISSOURI

en banc

STATE ex rel. CHRISTOPHER SIMMONS,	)	
Petitioner,	)	
vs.	)	**No. SC84454**
DONALD P. ROPER, Superintendent, Potosi Correctional Center,	)	
Respondent.	)	

DISSENTING OPINION

I.

I respectfully dissent.

Our constitutional form of government allows for the will of the people to be expressed, for better or worse, through the laws enacted by their elected representatives. The role of the courts is merely to interpret such statutes and to rule upon their constitutionality, if necessary.

Missouri has enacted section 565.020.2, RSMo, providing that individuals over the age of sixteen, who knowingly cause the death of another after deliberation may be subjected to the death penalty.

Although this statute is subject to serious controversy, it is the enacted will of the people of Missouri and must be enforced unless it is in violation of either the Missouri or United States Constitutions.

The majority opinion of this Court holds that section 565.020.2 violates the United States Constitution. This opinion is directly in conflict with the United States Supreme Court decision of *Stanford v. Kentucky*, 492 U.S. 361 (1989), consolidated with *Wilkens v. Missouri*, No. 87-6026, which specifically states:

> We discern neither a historical nor a modern societal consensus forbidding the imposition of capital punishment on any person who murders at 16 or 17 years of age. Accordingly, we conclude that such punishment does not offend the Eighth Amendment's prohibition against cruel and unusual punishment.
>
> The judgments of the Supreme Court of Kentucky and the Supreme Court of Missouri are therefore affirmed.

492 U.S. at 380.

The United States Supreme Court has not overruled *Stanford*, even in light of its decision in *Atkins v. Virginia*, 122 S.Ct. 2242 (2002), nor after recent consideration of the precise arguments relied upon by the majority of this Court, *see Mullin v. Hain*, 538 U.S. ___, 123 S.Ct. 1645 (2003) (mem.) (order

granting application to vacate the stay of execution of defendant who was seventeen years old when he committed murder); *In re Stanford*, 537 U.S. ___, 123 S.Ct. 472 (2002) (denying writ of *habeas corpus* of petitioner who was seventeen years when he committed murder); *Patterson v. Texas*, 536 U.S. ___, 123 S.Ct. 24 (2002) (denying writ of *habeas corpus* of petitioner who was seventeen years old when he committed murder). It is the United States Supreme Court's prerogative, and its alone, to overrule one of its decisions. *United States v. Hatter*, 532 U.S. 557, 567 (2001); *Hohn v. United States*, 524 U.S. 236, 252-53 (1998); *State Oil Co. v. Kahn*, 522 U.S. 3, 20 (1997); *Rodriquez de Quinas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989).

This Court is bound by the United States Supreme Court's decision in *Stanford v. Kentucky* and simply has no authority to overrule that decision.

II.

Petitioner, Christopher Simmons, was born on April 26, 1976. On September 10, 1993, when he was approximately seventeen-years and five-months old, petitioner was arrested for the murder of Shirley Crook. Following a botched robbery attempt, petitioner kidnapped Ms. Crook, bound and gagged her. Petitioner walked Ms. Crook down a railroad trestle, bound her more, and pushed her, while still alive, over the trestle and into the Meramec River. Prior to the robbery, petitioner stated to his accomplice that they could commit a robbery and murder and get away with it because they were juveniles.

Petitioner now asks this court for *habeas corpus* relief, alleging that his death sentence is illegal because he was a juvenile at the time of his crime. Petitioner acknowledges that *Stanford v. Kentucky*, 492 U.S. 361 (1989), explicitly held that the United States Constitution was not violated by the execution of a sixteen or seventeen-year-old defendant. However, petitioner alleges that the United States Supreme Court's recent decision, *Atkins v. Virginia*, 122 S.Ct. 2242 (2002), "***implicitly*** overrules the controlling precedent of *Stanford* . . . ." (emphasis added).

Stanford specifically addressed Missouri's capital punishment statute in determining that there was "neither a historical nor a modern societal consensus forbidding the imposition of capital punishment on any person who murders at 16 or 17 years of age" and "such punishment does not offend the Eighth Amendment's prohibition against cruel and unusual punishment." *Stanford*, 492 U.S. at 366, 380. *Stanford* noted its petitioners failed to establish a societal "consensus against capital punishment for 16 and 17-year-old offenders through state and federal statutes and the behavior of prosecutors and juries. . . ." *Id.* at 377. The Supreme Court explicitly refused to consider "other indicia, including public opinion polls, the views of interest groups, and the positions adopted by various professional associations." *Id.* "A revised national consensus so broad, so clear, and so enduring as to justify a permanent prohibition upon all units of democratic government must appear in the operative acts (laws and the application of laws) that the people have approved." *Id.*

The United States Supreme Court did not overrule *Stanford* in *Atkins v. Virginia*, 122 S.Ct. 2242 (2002), *Atkins* did not deal with juveniles, but addressed capital punishment of mentally retarded persons. *Id.* at 2244. The Court held that capital punishment of the mentally retarded was cruel and unusual for two reasons: 1) mentally retarded persons "do not act with the level of moral culpability that characterizes the most serious adult criminal conduct," *Id.*; and 2) the prevailing standards of decency reflected by objective standards such as legislatures, experts, and the public establish a consensus against imposing capital punishment upon the mentally retarded. *Id.*

United States Supreme Court decisions interpreting the Constitution are the supreme law of the land. *Cooper v. Aaron*, 358 U.S. 1, 18 (1958).[1] "State court judges in Missouri are bound by the 'supreme law of the land,' as declared by the Supreme Court of the United States (Art. VI, Constitution of the United States)." *Kraus v. Bd. of Educ.*, 492 S.W.2d 783, 784 (Mo. 1973). *See also Rodgers v. Danforth*, 486 S.W.2d 258, 259 (Mo. banc 1972) (citing U.S. Const. art. VI; *Cooper*, 358 U.S. 1 (1958) (This court "is bound to follow the decisions of the Supreme Court of the United States.").

This Court's solemn duty to abide by decisions of

[1]"[T]he interpretation of [the Constitution] enunciated by this Court in [its decision] is the supreme law of the land, and Art. VI of the Constitution makes it of binding effect on the States 'any Thing in the Constitution or Laws of any State to the Contrary notwithstanding'" *Cooper*, 358 U.S. at 18.

the Supreme Court of the United States is not abridged simply because we disagree with that Court's decision or even if it appears that a decision was clearly in error. Neither can this Court imply or anticipate the overruling of a decision of the United States Supreme Court.

In *State Oil Co. v. Kahn*, the court of appeals "characterized [the United States Supreme Court's previous decision] as 'unsound when decided' and 'inconsistent with later decisions' of [that] Court," but "felt constrained to follow that decision." 522 U.S. 3, 9 (1997) (citation omitted). The Supreme Court of the United States agreed with the appellate court's characterization of its previous opinion, but applauded the court of appeals for respecting the doctrine of *stare decisis*. *Id.* at 20.

> Despite what Chief Judge Posner aptly described as *Albrecht's* "infirmities, [and] its increasingly wobbly, motheaten foundations," there remains the question whether *Albrecht* deserves continuing respect under the doctrine of *stare decisis*. The Court of Appeals was correct in applying that principle despite disagreement with *Albrecht*, for it is this Court's prerogative alone to overrule one of its precedents.

Id. (internal citation omitted).

Similarly, *Rodriquez de Quinas v. Shearson/American Express, Inc.* noted a shift away

from "the old judicial hostility to arbitration." 490 U.S. 477, 480 (1989). That viewed had "been steadily eroded over the years" and the Court itself took notice of the shift in a prior opinion. *Id.* at 480-81. However, the Supreme Court "did not suggest that the Court of Appeals on its own authority should have taken the step of renouncing" the Court's prior decision. *Id.* at 484.

> If a precedent of [the Supreme Court of the United States] has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals [or other court] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.

Id.

The Supreme Court of the United States has not chosen to exercise its prerogative of overruling *Stanford v. Kentucky*, despite several very recent opportunities to do so. *See Mullin v. Hain*, 538 U.S. ___, 123 S.Ct. 1654 (2003) (mem. order); *In re Stanford*, 537 U.S. ___, 123 S.Ct. 472 (2002); *Patterson v. Texas*, 536 U.S. ___, 123 S.Ct. 24 (2002). In each case, the defendant was seventeen-years-old when he committed the crime for which he was sentenced to death. The Supreme Court refused to reexamine *Stanford v. Kentucky* despite vigorous dissents raising precisely the same arguments as presented to this Court.

While the majority of this Court might believe that *Stanford v. Kentucky* has been abandoned in light of *Atkins* and in light of their perception of a national consensus regarding capital punishment of juvenile offenders, their belief and perception are not sufficient to preempt the Supreme Court of the United States concerning its existing precedent.

It is the prerogative of the Supreme Court of the United States, and its alone, to overrule one of its decisions.

The proper venue for Simmons to seek relief on this issue is the Supreme Court of the United States. I would deny the writ.

WILLIAM RAY PRICE, JR., Judge

STATE of Missouri, Respondent,

v.

Christopher SIMMONS, Appellant.

No. 77269.

Supreme Court of Missouri,
En Banc.

April 29, 1997.

Rehearing Overruled May 27, 1997.

ROBERTSON, Judge.

A jury convicted Christopher Simmons of first-degree murder and recommended that he be sentenced to death for the abduction and murder of Shirley Crook. The trial court sentenced Simmons to death. Simmons appeals, raising numerous points challenging the propriety of his conviction and death sentence and his counsels' performance. Simmons filed a timely Rule 29.15 motion which the trial court overruled. This Court's exclusive appellate jurisdiction is founded on article V, section 3 of the Missouri Constitution. We affirm the judgment of conviction and sentenced and the denial of relief under Rule 29.15.

I.

Facts

Simmons does not challenge the sufficiency of the evidence to support his conviction. We recite the facts only in sufficient detail to reconstruct the factual environment in which the legal issues arise.

In early September 1993, Christopher Simmons, then age 17, discussed with his friends, Charlie Benjamin (age 15) and John Tessmer (age 16), the possibility of committing a burglary and murdering someone. On several occasions, Simmons described the manner in which he planned to commit the crime: he would find someone to burglarize, tie the victim up and ultimately push the victim off a bridge. Simmons assured his friends that their status as juveniles would allow them to "get away with it." Simmons apparently believed that a "voodoo man" who lived in a nearby trailer park would be the best victim. Rumor had it that the voodoo man owned hotels and motels and had lots of money despite his residence in a mobile home park.

On September 8, 1993, Simmons arranged to meet Benjamin and Tessmer at around 2:00 a.m. the following morning for the purpose of carrying out the plan. The boys met at the home of Brian Moomey, a 29-year-old convicted felon who allowed neighborhood teens to "hang out" at his home. Tessmer met Simmons and Benjamin, but he refused to go with them and returned to his own home. Simmons and Benjamin left Moomey's and went to Shirley Crook's house to commit a burglary.

The two found a back window cracked open at the rear of Crook's home. They opened the window,

reached through, unlocked the back door, and entered the house. Moving through the house, Simmons turned on a hallway light. The light awakened Mrs. Crook, who was home alone. She sat up in bed and asked, "Who's there?" Simmons entered her bedroom and recognized Mrs. Crook as a woman with whom he had previously had an automobile accident. Mrs. Crook apparently recognized Simmons as well.

Simmons ordered Mrs. Crook out of her bed and, when she did not comply, Simmons forced her to the floor with Benjamin's help. While Benjamin guarded Mrs. Crook in the bedroom, Simmons found a roll of duct tape, returned to the bedroom, and bound her hands behind her back. The two also taped Mrs. Crook's eyes and mouth shut. They walked Mrs. Crook from h er home and placed her in the back of her minivan. Simmons drove the van from Mrs. Crook's home in Jefferson County to Castlewood State Park in St. Louis County.

At the park, Simmons drove the van to a railroad trestle that spanned the Meramec River. Simmons parked the van near the railroad trestle. He and Benjamin began to unload Mrs. Crook from the van and discovered that she had freed her hands and had removed some of the duct tape from her face. Using Mrs. Crook's purse strap, the belt from her bathrobe, a towel from the back of the minivan, and some electrical wire found on the trestle, Simmons an Benjamin bound Mrs. Crook, restraining her hands and feet and covering her head with a towel. Simmons and Benjamin walked Mrs. Crook to the railroad Trestle. There, Simmons bound her hands and feet

together, hog-tie fashion, with the electrical cable and covered Mrs. Crook's face completely with duct tape. Simmons then pushed her off the railroad trestle into the river below. At the time she fell, Mrs. Crook was alive and conscious. Simmons and Benjamin threw Mrs. Crook's purse into the woods and drove the van back to the mobile home park across from the subdivision in which Mrs. Crook lived.

Later that day, Simmons went to Moomey's trailer and bragged to Moomey that he had killed a woman "because the bitch seen my face." In the meantime, Steven Crook, Shirley's husband, returned home from an overnight trip and discovered that his wife had not gone to work as scheduled. When he did not hear from his wife by that evening, he filed a missing persons report.

That same afternoon, two fishermen found a body floating in the Meramec River, three quarters of a mile downstream from the railroad trestle. The fishermen notified authorities, who removed the body. The medical examiner identified the body from fingerprints, determined the cause of death as drowning and noted that the victim was alive prior to being pushed from the bridge. The examiner also reported that Mrs. Crook had sustained several fractured ribs and considerable bruising and that these injuries did not result from her fall from the railroad trestle.

The next day, September 10, police received information that Simmons was involved in the murder. They arrested Simmons at his high school and took him to the Fenton, Missouri, police department. Police

read Simmons the warnings required by *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). Simmons waived his constitutional rights and, after a little less than two hours of questioning, confessed to the murder. He also agreed to videotape a confession and to take part in a videotaped "reenactment" of the murder at the crime scene.

The Jefferson County prosecutor charged Simmons with first-degree murder, burglary, kidnapping and stealing. The trial court severed the last three charges for trial purposes. Simmons sought a change of venue. The trial court refused but agreed to transfer a jury from Cape Girardeau County into Jefferson County to hear the case due to the substantial publicity the crime had received in Jefferson County.

The jury found Simmons guilt of first-degree murder and recommended the death sentence. The trial court sentenced Simmons to death. Simmons filed a Rule 29.15 motion, which his appointed public defender amended in a timely fashion. Following an evidentiary hearing, the motion court overruled Simmons's rule 29.15 motion. Simmons appealed the conviction, his sentence, and the denial of post-conviction relief.

II.

Venue

Simmons contends that venue did not lie in Jefferson County, but rather in St. Louis County, and

that the trial court erred in not transferring the case to St. Louis County or, alternatively, dismissing the charges. Although the burglary and abduction occurred in Jefferson County, Crook's death took place in St. Louis County and thus, Simmons argues, venue lies in St. Louis County.

For support, Simmons cites *State v. Harvey*, 730 S.W.2d 271 (Mo.App. 1987). *Harvey* is inapposite. It holds that ***jurisdiction*** of a murder is properly ***in the state*** in which the defendant delivered the fatal wound or blow.

Venue of homicides is governed by section 565.001.4, RSMo 1994. *State v. Lingar*, 726 S.W.2d 728, 732 (Mo. banc 1987). That statute provides that, in instances where the offense is committed partly in one county and partly in another or where the elements of the crime occur in more than one county, the defendant may be prosecuted in any of the counties where any element of the offense occurred.

Appellate review of this question focuses on whether one can reasonably infer from the facts and circumstances that the crime occurred within the trial court's venue. *Lingar* at 732. The evidence shows that Simmons broke into Shirley Crook's home in Jefferson County, found her there, and believed she would recognized him because he had an automobile accident that involved Mrs. Crook. Simmons bound Mrs. Crook in Jefferson County, placed her in her van in Jefferson County, and drove to the railroad trestle spanning the Meramec River in St. Louis County, bearing the intent to kill her he had formed in Jefferson County.

Deliberation is an element of first degree murder. Section 565.020.1, RSMo 1994. This Court observed in *Lingar* that the conclusion that the defendant had deliberated the crime within a county is sufficient to establish venue in that county under section 565.001.4. *Lingar,* 726 S.W.2d at 732. *See also Leisure v. State*, 828 S.W.2d 872, 879 (Mo. banc 1992) (finding that deliberation and premeditation within St. Louis City made venue proper although death occurred outside the city limits).

From the evidence, it is reasonable to conclude that Simmons deliberated the crime in Jefferson County. This finding is sufficient to establish venue in Jefferson County under section 565.001.4. The point is denied.

III.

Jury Selection

A.

Simmons assigns error to the trial court's decision to sustain the state's challenges for cause to two venirepersons who expressed a discomfort with and uncertainty about the death penalty, claiming a violation of his Sixth Amendment right to an impartial jury.

When a prospective juror's views on the death penalty would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and oath," *Wainwright v. Witt*, 469 U.S. 412, 424, 105 S.Ct. 844, 852, 88 L.Ed.2d 841

(1985), the trial court may exclude the juror for cause. The trial court must determine whether the views expressed by a prospective juror will prevent or substantially impair performance of a juror's duties, subject to appellate review for abuse of discretion. On review, the trial court is afforded great deference because of its superior ability to "interpret and evaluate a venireman's answers and demeanor." *State v. Leisure*, 749 S.W.2d 366, 374 (Mo. banc 1988).

Venireperson Judith Fluegge indicate that her father was a minister, that his teachings emphasized that "it's wrong to take someone's life," and that she would be very uncomfortable considering the death penalty as a punishment option. At her moment of greatest assurance about her ability to impose the death penalty - a moment brought about by defense counsel's attempt to qualify her for the jury - Ms. Fluegge said that she would be willing to listen to evidence as to why she should consider the death penalty and that she could "possibly" consider imposing the death penalty.

Venireperson Laura Hecht also expressed reservations about the death penalty, doubting her ability to concentrate on the evidence with the possibility of participating in a penalty phase deliberation involving the death penalty awaiting her. Her strongest commitment to considering the full range of penalties came when she said in response to defense counsel's inquiry that she "possibly could, yes" consider the death penalty.

We discover no abuse of the trial court's

discretion in its decision to sustain the state's challenges for cause to these two venirepersons on the basis of their indecision and, specifically as to Ms. Hecht, on account of her doubts about her ability to concentrate on the evidence. The points are denied.

B.

During voir dire, the state asked:

> "Is there anybody here for the sole fact of the defendant's age could not sit in judgment in this case?"
>
> "You're not saying that just because of his age you wold never consider [the death penalty]? You would be able to at least consider it?"
>
> "And is your position that because of the Defendant's age, you could not consider both punishments?"
>
> "I'm not saying that you shouldn't be able to consider a person's age. What I'm saying is wold that totally exclude for you any possibility of considering a sentence of death."

Simmons claims that these questions and statements about his age and their affect on a venirepersons' ability to sit in judgment over him in both the guilt and penalty phases violate the Eighth Amendment to the United States Constitution. Simmons claims that such

questioning suggested that age was not a proper mitigating factor and could not be used as a basis for deciding against imposing the death penalty. Simmons further argues that the prosecutor sought a commitment from the jurors to impose the death penalty. Review is for abuse of discretion.

In *State v. Richardson* 923 S.W.2d 301 (Mo. banc 1996), the trial court dismissed potential jurors because they would not consider the death penalty on account of the defendant's age. Richardson claimed that these dismissals were improper because age is a legitimate statutory mitigating factor. This Court upheld the dismissals, noting the difference between the consideration of mitigating circumstances, which jurors must do, and a flat refusal to consider the full range of punishment, which is grounds for disqualification. *Id.* at 309. Simmons contends that his case is distinguishable because the state led the jurors to believe that they should not consider age at all.

The state's questions and statements explore the issue whether the venirepersons would be able to perform their duties as jurors - whether they would be able to sit in judgment during the guilt phase and whether they would be able to consider the full range of punishment during the penalty phase because of the defendant's age. It remains the law that both the defendant and the state are entitled to a fair jury. Contrary to Simmons's argument, the state's voir dire questions and statements do not suggest that the defendant's age cannot be considered; in fact, the prosecutor expressly rejected that position. Instead,

the state's inquires asked whether a potential juror would place too much weight on defendant's age when considering the facts and, ultimately, the appropriate punishment. Nor do the statements seek a commitment to vote for the death penalty.

Richardson controls. The trial court did not abuse its discretion in allowing the questions. The point is denied.

IV.

Confession

Simmons contends that he confessed involuntarily and that he should have a new trial. He claims this despite his receipt of *Miranda* warnings and his waiver of the rights the warnings protect. He maintains his Fifth Amendment rights were violated because he was subjected to interrogation despite his announcement of his intent to remain silent; he also asserts that he was coerced into confessing by intimidation and promises of leniency.

The *Miranda* warnings are "prophylactic." *Duckworth v. Eagan*, 492 U.S. 195, 203, 109 S.Ct. 2875, 2880, 106 L.Ed.2d 166 (1989). They are a judicial creation designed to "assure that the individual's right to choose between silence and speech remains unfettered throughout the interrogation process," *Miranda*, 384 U.S. at 469, 86 S.Ct. at 1625, despite an "interrogation environment [that] is created for no purpose other than to subjugate the individual to the will of his examiner." *Id.* at 457, 86 S.Ct. at

1619.

The test for whether a confession is voluntary is whether the totality of the circumstances created a physical or psychological coercion sufficient to deprive the defendant of a free choice to admit, deny or refuse to answer the examiner's questions. *State v. Lytle*, 715 S.W.2d 910, 915 (Mo. banc 1986). On appeal, the evidence pertaining to the admissibility of appellant's confession is reviewed in the light most favorable to the trial court's ruling. *State v. Debler*, 856 S.W.2d 641, 650 (Mo. banc 1993). Any conflicts in the evidence are for the trial court to resolve, and this Court will defer to the trial court's superior position from which to assess credibility. *Lytle*, 715 S.W.2d at 915.

According to the evidence adduced at the preliminary hearings and at trial, police arrested Simmons at his highschool and drove him to the Fenton police headquarters. No questioning occurred at the time of the arrest nor during the journey to police headquarters. Upon arrival, Detectives Knoll, Elia, and Milano took Simmons into an interrogation room. Using a department form, Knoll read Simmons the warnings *Miranda* requires. Simmons initialed the rights on the form, indicating that he understood those rights. Simmons then signed a waiver of the rights the *Miranda* warnings are designed to protect, and the detectives commenced the interrogation. This initial interrogation was not electronically recorded.

The initial interrogation session lasted approximately two hours. At first, Simmons denied any knowledge of the crime. The detectives

occasionally raised their voices and moved within close proximity (a foot) of Simmons's face. Knoll told Simmons that he thought Simmons was lying. The detectives also suggested that Simmons's accomplice, Charles Benjamin, hd been arrested and was possibly confessing at that moment.

At some point during the interrogation, Lt. Edward Robertson, head of the major case squad, entered the room. He told Simmons that he was facing either the death penalty or life in prison and that is would be in his "best interest" to tel the truth. After Robertson left, Knoll and the other detectives encouraged Simmons to remember what Robertson had said and that it would be better for him to tell the truth.

Eventually, Simmons asked everyone but Detective Knoll to leave the room. Simmons confessed. Simmons then agreed to permit videotaping of his confession. Prior to his videotaped confession, Simmons again received the *Miranda* warnings and again Simmons waived his constitutional rights.

A.

Simmons acknowledges that the officers read him the *Miranda* warnings at least twice, and that each time, he indicated that he understood those rights and waived them. The fact that a defendant is repeatedly read the *Miranda* warnings, and voluntarily waives his rights, weighs in favor of a finding that the defendant voluntarily confessed. *State v. Lytle*, 715 S.W.2d 910 (Mo. 1986). Simmons, however, contends

that the detectives conducting the investigation violated these rights by continuing to question him after he had indicated his intent to exercise his right to remain silent.

After receipt of the *Miranda* warnings, "if the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease." *Miranda*, 384 U.S. at 473-474, 86 S.Ct. at 1627. A person has a right under the Fifth Amendment to "cut off questioning" and this right must be scrupulously honored. *Michigan v. Mosley*, 423 U.S. 96, 103, 96 S.Ct. 321, 326, 46 L.Ed.2d 383 91975). The suspect, however, must give "a clear, consistent expression of a desire to remain silent" in order to invoke his rights adequately and cut off questioning. *United States v. Thompson*, 866 F.2d 268, 272 (8th Cir. 1989).

Nowhere in the record is there any direct testimony - from Simmons or anyone else - as to anything Simmons said or did that would constitute a "clear, consistent expression of a desire" to assert his Fifth Amendment rights and remain silent. The bulk of the evidence in the record pertinent to this issue consists of Simmons stating that he understood his rights, that he waived those rights, and that he confessed freely and voluntarily. Because Simmons received and understood the *Miranda* warnings, he also knew and understood that he had the right to stop the interrogation at any time. The record shows without equivocation that among the rights that Simmons initialed and indicated he understood was the following:

> If you decide to answer questions now without a lawyer present, you will still have the right to stop answering at any time. You also have the right to stop answering at any time until you talk to a lawyer.

Simmons, although aware of this right, never exercised it. At trial, defense counsel asked Detective Knoll the following questions during cross-examination:

> Q. You advised Chris of his rights?
> A. Yes, sir, I did.
> Q. And you told him that he didn't have to talk to you?
> A. Yes, I did.
> Q. Did he have any problems - did he say, "I don't want to talk to you?"
> A. No.
> Q. Did he freely sign those forms?
> A. Yes, he did.
> Q. And he freely started to talk to you?
> A. Yes, he did.
> Q. And what did he tell you at first?
> A. He said he didn't have any involvement in the crime.
> Q. Well, did he terminate the interview at that point in time?
> A. No, he did not.

The only evidence Simmons cites in support of his claim is a statement that Detective Knoll made at the beginning of Simmons's videotaped confession. The

statement upon which Simmons relies follows an exchange in which Detective Knoll shows Simmons the advice-of-rights form and confirms that the form had been read to him; that Simmons understood it; and that Simmons had initialed and signed the *Miranda* waiver. Detective Knoll then observed that the investigation hd been going on for some two hours and said: "During the time all of this [the interrogation] has been going on, you first started off saying you didn't know nothing about this crime, and you didn't want to tell us anything. Is that correct?"

This single, isolated statement hardly establishes that Simmons made a clear, consistent expression of a desire to remain silent. Read in context, Detective Knoll's statement refers to Simmons's initial denial of involvement in the crime, not any assertion of the Fifth Amendment right to remain silent. Furthermore, at trial, when directly asked by the defense whether Simmons ever sought to terminate the questioning, Defective Knoll denied that Simmons had. Viewing the record as a whole, we find no substantial, credible evidence that Simmons ever asserted his right to terminate the questioning and remain silent.

B.

Simmons also claims that Detective Knoll threatened to use Simmons's silence against him, in violation of his Fifth Amendment rights. Detective Knoll allegedly told Simmons that if he did not tell the truth and confess, Knoll would testify about Simmons denying any involvement in the crime.

As evidence supporting his claim, Simmons points to the following from the deposition of Detective Knoll:

> Question: Did you discuss with [Simmons] in what ways his failure to give a statement could hurt him?
>
> Answer: Well, we just told him that if he chose to lie, which I believed he was, not to tell the truth, that if it went to court then I would get on the stand and I would testify that he sat there during the whole interrogation, and denied his involvement in the case.

This colloquy does not show an intent by Detective Knoll to use Simmons's *silence* against him. Rather, Knoll said that he would use Simmons's *statements* against him - his denials of involvement in the crime. A denial of involvement in the crime is not an invocation of one's right to remain silent. *State v. Pollock*, 603 S.W.2d 614, 620 (Mo. App. 1980); *State v. Burley*, 523 S.W.2d 575, 578 (Mo.App. 1975).

In telling Simmons that he would testify that Simmons denied involvement in the case, Knoll also indirectly reminded Simmons that anything Simmons said could be used against him in court. Knoll did not mislead Simmons as to the scope of the rights. *Miranda* protects, nor did Knoll's statements infringe Simmons's right to remain silent.

C.

Simmons also contends that he confessed in exchange for a promise of leniency. Simmons claims that the detectives made an implied promise of leniency when they told him that he could possibly face the death penalty and that it would be better for him if he told the truth.

A confession resulting from a direct or indirect promise of leniency is inadmissible. *State v. Chandler*, 605 S.W.2d 100, 116 (Mo. banc 1980). However, officers' statements to a suspect that cooperating is in his or her best interests are not improperly coercive and do not, as a matter of law, render a confession involuntary. *Bannister v. Armontrout*, 4 F.3d 1434, 1440 (8th Cir. 1993); *State v. Klueg*, 781 S.W.2d 133, 136 (Mo.App. 1989); *State v. Wilson*, 755 S.W.2d 707, 709 (Mo.App. 1988); *State v. Dixon*, 655 S.W.2d 547, 556 (Mo.App. 1983). *See also U.S. v. Ruggles*, 70 F.3d 262, 265 (2nd Cir. 1995); *United States v. Ballard*, 586 F.2d 1060, 1063 (5th Cir. 1978) (finding that encouraging a suspect to tell the truth does not, as a matter of law, render the confession involuntary, even where the suspect is only sixteen years old).

There is no indication on this record that the detectives made any promise whatsoever to Simmons. They simply told him that is was in his best interest to tell the truth. Simmons tries to create an implied promise by linking the statements that it would be in his best interest to tell the truth to Robertson's statement that he was possibly facing the death penalty. We find this supposed nexus far too tenuous to support Simmons's contentions. "If defendant had a hope of leniency, that hope 'springs from the seeds of

his own planting [and] is not sufficient to render the resulting confession inadmissible.'" *State v. Schnick*, 819 S.W.2d 330, 336 (Mo. banc 1991).

D.

Simmons also contends that under the totality of the circumstances, his confession must be found involuntary. In determining whether a confession resulted from im proper mental coercion, the court considers factors such as age, experience, intelligence, gender, lack of education, infirmity, and unusual susceptibility to coercion, but no one fact is dispositive. *State v. Lytle,* 715 S.W.2d at 915. Simmons reminds the Court that he was 17 years old at th time of the interrogation, a not-too-successful high school student, possessed of a low intelligence quotient and likely did not understand his constitutional rights, despite his assurances to the contrary at the time of the interrogation.

The record shows that authorities interrogated him for nearly two hours. Simmons claims the detectives used impermissibly coercive tactics to wrench a confession from him. Among those coercive tactics were yelling, "getting in his face," and misleading him about whether his accomplice Charlie Benjamin was making a statement implicating him.[1] The totality of these circumstances rendered Simmons's *Miranda* waiver involuntary, he now

[1]Simmons also incorporates his prior arguments as evidence of improper police coercion, but we have already found above that the police did not engage in improper activity.

contends.

Viewing the evidence in the light most favorable to the trial court's decision, we do not find, under the totality of the circumstances, that Simmons was deprived of a free choice to admit, deny or refuse to answer the detectives' charges, nor that he was subjected to such psychological coercion that his will was overborne at the time he confessed. The questioning was not unduly long; it lasted approximately two hours. Although the detectives "got in his face," no detective ever touched Simmons nor was he ever threatened with any physical harm. The detectives made neither promises nor threats. Although Simmons was told he could face the death penalty, such a statement does not constitute a threat but is a permissible observation of the possible consequences of first degree murder. *See, e.g., United States v. Scurlock*, 52 F.3d 531 (5th Cir. 1995) (finding that a truthful, non-coercive statement of the possible penalties an accused faces does not overbear the accused's free will). As for suggesting that his accomplice, Charlie Benjamin, was contemporaneously giving a statement implicating him, this tactic does not, *per se*, render Simmons's confession involuntary. Confessions obtained by falsely leading an accused to believe an accomplice has made statements implicating the accused are admissible. *State v. Flowers*, 592 S.W.2d 167, 169 (Mo. 1979).

We find no error in the trial court's decision to admit Simmons's confession. The points are denied.

V.

Detective Knoll's Testimony

Simmons claims the trial court denied his rights to due process and a fair trial because the trial court allowed Detective Knoll to offer his opinion as to Simmons's truthfulness and to testify as to whether Simmons expressed any remorse for the crime.

A.

On redirect, the prosecutor asked Detective Knoll whether he believed that the final version of the story that Chris Simmons gave him was "the absolute truth." Simmons's counsel objected to the question on the grounds that the question would invade the province of the jury to determine Simmons's veracity. The prosecutor argued that he was trying to rebut the defense's cross-examination, which sought to establish that Knoll never actually knew what "the absolute truth" was, but rather considered anything Simmons told him to be "the absolute truth" as long as those statements implicated Simmons in the crime. The trial court sustained the objection. The prosecutor rephrased the question, asking:

> Q. Detective, after your investigation of this case, and knowing all the things you now know, do you believe that Chris Simmons told you everything about what he did?

The trial court overruled the defense's objection to the new question, and Detective Knoll responded, "No, I do not."

Despite Simmons's claim to the contrary, the second question and Knoll's answer are not improper comments by Knoll on Simmons's veracity. Knoll's statement focuses on whether he believed there was more Simmons could have said in his confession.

In any event, there is no prejudice. There is ample evidence to support Simmons's conviction. Simmons's own words are sufficiently damning to make Knoll's statements inconsequential.

Moreover, it would make little sense for Knoll to question Simmons's credibility when Simmons's own confession is the strong, nearly impregnable foundation of the state's case. The point is denied.

B.

Simmons also takes issue with Detective Knoll's testimony on redirect that Simmons never said he was sorry. Simmons contends this testimony was irrelevant and immaterial to the issue of guilt, and the trial court abused its discretion in allowing the testimony.

On cross-examination, the defense established through Detective Knoll that Simmons cried on several occasions during his confession. On redirect examination, the prosecutor asked:

> Q. Detective Knoll, I'll ask you again, defense counsel asked you if the Defendant was crying. At any time, did he ever say he was sorry?

A. No, he did not.

In response to an objection, the prosecutor claimed that he addressed the question of Simmons's remorse, or lack thereof, to rebut the possible inference of remorse the jury might have made from the fact that Simmons was crying. The determination of the scope of rebuttal is within the trial court's discretion and, absent an abuse of such discretion, the trial court's decision will not be reversed. *State v. Hamilton*, 892 S.W.2d 371, 379 (Mo.App. 1995).

While it is not clear that the defense raised the issue of remorse by injecting evidence of the defendant's lacrimation, we cannot say that the admission of Knoll's testimony of rebuttal - absent any showing of prejudice and in light of the overwhelming evidence supporting the conviction - rose to the level of an abuse of discretion that requires reversal. The point is denied.

VI.

"Voodoo Man" Testimony

Simmons claims that the trial court erred during the guilt phase in allowing two witnesses to testify regarding Simmons's plans and preparations to steal from and murder a neighborhood resident known as the "voodoo man." This testimony, according to Simmons, constituted evidence of prior bad acts, was not offered for any of the recognized exceptions to the evidentiary rule that excludes evidence of other crimes, and was both irrelevant and highly prejudicial.

A.

The first mention of the "voodoo man" at trial came from Christie Brooks, who testified that Simmons came by her house about five hours prior to the break-in at Shirley Crook's residence and told her that he and two others were going to rob the "voodoo man." Defense counsel did not object to Christie Brooks's testimony and, on appeal, Simmons requests plain error review.

In *State v. Brown*, 912 S.W.2d 278, 284 (Mo. banc 1995), we said:

> [U]nless a claim of plain error facially establishes substantial grounds for believing that "manifest injustice or miscarriage of justice has resulted," this Court will decline to exercise its discretion to review for plain error under Rule 20.20. We will, however, consider related claims of ineffective assistance of counsel for failure to preserve the alleged trial error under the test of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

Simmons's point does not raise a substantial ground for finding plain error on its face.

B.

Additional and more detailed testimony regarding the plot to rob the voodoo man arose later in

the trial when John Tessmer testified. Defense counsel had filed a motion in limine regarding Tessmer's testimony about the voodoo man, which the trial court overruled. Defense counsel offered a continuing objection to the testimony at trial, which was also overruled.

Tessmer testified that Simmons talked about a plan to murder someone because he wanted "a bunch of money." Simmons told Tessmer he would throw the victim off a bridge and had the "voodoo man" in mind. Simmons discussed the plan with Tessmer three to five times during the early part of September. The voodoo man was always the intended victim whenever Simmons discussed his plan with Tessmer. Simmons also discussed the plan with Tessmer and Charlie Benjamin while at Brian Moomey's house, saying that he wanted to kill someone and "get a bunch of money" by tying them up and throwing them off a bridge or by tying the victim to a tree and getting the victim's bank car.

Tessmer also testified that he observed Simmons making masks out of sweatshirts so the voodoo man would not see their faces. About four days prior to Shirley Crook's murder, Simmons allegedly asked Charlie Benjamin to help them kill somebody, according to Tessmer. Tessmer said that about three days before the murder, he saw ropes and gloves at Simmons's house.

On September 8, Simmons told Tessmer that he wanted to meet him and Charlie Benjamin at Brian Moomey's house at 2:00 a.m. the following morning for

the purpose of committing the murder. Tessmer met Simmons at Brian Moomey's house but did not go with him to Shirley Crook's house. Tessmer did not believe that Simmons was actually intending to rob and murder someone that night. Tessmer also testified that Simmons did not have any weapons, masks, or other equipment with him that night.

The trial court has broad discretion to exclude or admit evidence at trial. This Court will reverse only upon a showing of a clear abuse of discretion. *State v. Parkhurst*, 8456 S.W.2d 31 (Mo. banc 1992). A trial court's admission of irrelevant and immaterial evidence, even of other crimes, will not be reversed on appeal absent a showing of prejudice. *State v. Ellis*, 853 S.W.2d 440, 445 (Mo. App. 1993). Tessmer's testimony is not other crimes testimony. It speaks directly to Simmons's motive and the deliberateness of his general plan to steal and murder. On that basis it is admissible. Nevertheless, and assuming for the sake of argument only that Tessmer's testimony should have been excluded, we do not find that is inclusion prejudiced Simmons in light of the other, overwhelming evidence of Simmons's guilt.

This case is not at all like *State v. Sladek*, 835 S.W.2d 308 (Mo. banc 1992), on which Simmons relies. In *Sladek*, it was ***explicitly*** clear that the trier of fact (in that case, the court), relied on the uncharged transgressions to convict Sladek. When sentencing Sladek, the trial court said that the state had a very weak case, that absent the evidence of trial court would not have found Sladek guilty, and that if the evidence of the uncharged transgressions should not

have come in, then Sladek's conviction should be reversed on appeal. *Id.* at 310-11.

In sum, Simmons has made no showing of prejudice that flowed from the testimony of John Tessmer. We find no abuse of discretion on the part of the trial court in overruling the defense's motion in limine and continuing objections at trial regarding John Tessmer's testimony.

VII.

Improper Closing Argument During Guilt Phase

Simmons assigns error to the trial court's failure to correct the prosecutor's closing argument during the guilt phase. Of the errors claimed, only one was properly preserved for review.

During the guilt phase of the trial, the prosecutor argued:

> the evidence is uncontroverted. Uncontroverted. The evidence of plotting, the evidence of burglary, the evidence of premeditation, the evidence of binding, the evidence of blindfolding, transporting, of murder. I'm going to ask you to go back, and render a verdict of guilt of murder in the first degree. You're never going to get to the other verdict because there was premeditation. This wasn't sudden passion. This wasn't an accident.

> Premeditation, binding and transporting. Render that verdict ***so we can get on with the rest of the trial***.

Defense counsel objected to the highlighted portion of the argument. The trial court overruled the objection. Simmons claims that the argument improperly refers to the punishment phase of the trial without giving the defense an opportunity to address the argument. Simmons relies on *State v. Maxie*, 513 S.W.2d 338, 345 (Mo. 1974), for the proposition that if punishment is discussed in closing arguments, the discussion should occur in the opening portion of the state's argument so that defense counsel has an opportunity to respond to that argument. Simmons also contends that the prosecutor's statement is contrary to the instructions of the court because the prosecutor argued that the jury should hurry in its deliberations.

The trial court's ruling will not be overturned absent an abuse of discretion resulting in prejudice to the defendant. *State v. Mahurin*, 799 S.W.2d 840 (Mo. banc 1990). An abuse of discretion exists only where the prosecutor's statements are plainly unwarranted and clearly 8njurious to the defendant. *Id.*

Reading the prosecutor's statements context, we do not believe that he prosecutor is urging the jury to hurry its deliberations or inviting the jury to consider punishment prematurely. At most, the prosecutor's argument is an artful attempt to summarize the overwhelming and undeniable evidence of guilt. The point id denied.

VIII.

Media Coverage

Simmons contends he was denied due process, a fair trial, and his right to confront witnesses because the trial court allowed cameras in the courtroom to cover the proceedings over Simmons's objection. Simmons claims he was prejudiced because the testimony of the State's witnesses, particularly Shane Knoll and Brian Moomey.

Electronic media coverage of criminal trials does not constitute a *per se* denial of due process. *Chandler v. Florida*, 449 U.S. 560, 574, 101 S.Ct. 802, 809-10, 66 L.Ed.2d 740 (1981). The defendant must produce evidence that the media coverage of his case "had an adverse impact on the trial participants sufficient to constitute a denial of due process." *Id.* at 581, 101 S.Ct. at 813. Simmons has not produced such evidence nor does his argument offer more than hopeful speculation. The point is denied.

IX.

Disclosure of Witness Arrest Records

Simmons contends he was deprived of a fair trial because the trial court refused to order the disclosure of the arrest records of all of the state's witnesses. As a result, Simmons claims, he could not effectively cross-examine the state's witnesses regarding their biases, prejudices, or motives to lie on the stand.

Rule 25.03 designates certain types of information that the state must disclose to the defendant. If the information sought by the defendant does not fall within any of these categories, the defendant may make a written motion to the court requesting the state to disclose the information under the terms of Rule 25.04. If the court finds the request reasonable, the court will order the state to disclose the information to the extent the court finds it relevant and material to the defendant's case.

In reviewing claims regarding meaningful discovery in a criminal trial, this Court looks to see whether there was a reasonable likelihood that the denial affected the result of the trial. The trial court's refusal to require disclosure will be overturned only if it appears that the trial court abused its discretion to the extent that fundamental unfairness to the defendant resulted. *State v. Mease*, 842 S.W.2d 98, 108 (Mo. banc 1992).

In this case, Simmons requested that the trial court order the state to disclose the prior criminal history or "rape sheets" of all state witnesses. Simmons admits that the trial court sustained Simmons's motion as to prior convictions,[2] but claims that the court refused to order the state to disclose the "rap sheets" or similar information regarding prior

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[2]We note that a court order is not necessary to obtain prior convictions as these are required to be disclosed under Rule 25.03(A)(7).

arrests that did not lead to convictions.[3] Simmons sought this information in order to impeach the witnesses' credibility. While generally, one may not impeach a witness's credibility by showing an arrest, investigation or criminal charge that has not resulted in a conviction, a party can use such evidence if the inquiry would demonstrate either (1) a specific interest of the witness; (2) the witnesses's motivation to testify favorably for the state; or (3) that the witness testified with an expectation of leniency. *State v. Wise*, 879 S.W.2d 494 (Mo. banc 1994).[4] Even for such purposes, a witness's arrest record would only be relevant to the

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[3]It is not clear what the trial court ordered disclosed in this regard. The rial court initially indicated that it would sustain Simmons's motion. The parties then discussed whether arrest records are discoverable or only prior convictions. The court then told the State "to summarize prior criminal history, but not to provide the original rape sheet." Mr. Crosby, for the defense, argued that the entire rap sheets were discoverable, although not necessarily admissible. The Court responded, "I'll stand on that for now" and called a recess. Upon return, the Court stated that it "had sustained [the motion for disclosure by Court order] as to the prior criminal history." The scope of "criminal history" is never defined.

[4]The state argues that Simmons was not entitled to disclosure because he failed to show that any of the above exceptions apply. This argument puts the cart before the horse. The exceptions address whether such information is admissible, not whether it is discoverable. The entire purpose of discovery of arrest records is to determine whether the witness had a motivation to testify favorably for the state or had an expectation of leniency. Admissibility issues arise only after the defense offers evidence that it found through discovery.

extent there are any *pending* charges; past arrests, investigations, or charges would not be relevant to show *present* motivation to testify favorably for the state. *See, e.g., State v. Joiner*, 823 S.W.2d 50, 53 (Mo. App. 1991) (distinguishing between the potential relevancy of pending charges and the irrelevancy of past charges).

For the purpose of impeachment, it appears that Brian Moomey is the only witness whose arrest records could have possibly been material or relevant to Simmons's case, assuming, of course, that those records would have revealed any pending charges. The trial court's apparent decision not to require disclosure of Moomey's arrest records is not an abuse of discretion, however, because there is simply no grounds for believing that the non-disclosure had any palpable effect on the outcome of the trial. Simmons confessed to the murder, and thus there was ample evidence of his guilt. As for impeaching Moomey's testimony, the defense established that Moomey had spent time in prison for assault with a weapon, burglary and stealing; that he drank heavily - indeed, admitted passing out almost every night, and that he had told the witness coordinator that he was afraid to testify because "people were investigating [him] for the murder, and the investigator was focusing on [him] as being involved in the death of Shirley Crook." Evidence of other of Moomey's illegal activities could hardly have had a negative impact on the jury's view of his character given what they already knew. Moreover, the record reflects ample opportunity to cross-examine the witnesses, and there is no evidence indicating that a "fundamental unfairness" resulted

from the trial court's decision not to require disclosure of Moomey's entire rape sheet. The point is denied.

X.

Reasonable Doubt Instructions

Despite nearly ten years of case law contrary to his position, Simmons doggedly raises the consistently-raised-but-to-date futile challenge to the validity of instructions based on MAI-302.04 and 313.30, claiming that the "firmly convinced" language in the instructions lowers the state's burden of proof, thereby depriving Simmons of due process. This Court has upheld the "firmly convinced" language in *State v. Chambers*, 891 S.W.2d 93 (Mo. banc 1994); *State v. Parker*, 886 S.w.2d 908 (Mo. banc 1994); *State v. Williams*, 871 S.W.2d 450 (Mo. banc 1994); *State v. Harris*, 870 S.W.2d 798, 811 (Mo. banc 1994); *State v. Shurn*, 866 S.W.2d 447, 462 (Mo. banc 1993); *State v. Ramsey*, 864 S.W.2d 320 (Mo. banc 1993); *State v. Griffin*, 848 S.W.2d 464, 469 (Mo. banc 1993); *State v. Ervin*, 835 S.W.2d 905, 924 (Mo. banc 1992); *State v. Blankenship*, 830 S.W.2d 1, 13 (Mo. banc 1992); *State v. Twenter*, 818 S.W.2d 623, 634 (Mo. banc 1991); *State v. Waller*, 816 S.W.2d 212 (Mo. banc 1991); *State v. Wacaser*, 794 s.W.2d 190, 195 (Mo. banc 1990); *State v. Murray*, 744 S.W.2d 762, 771 (Mo. banc 1988); *State v. Antwine*, 743 S.W.2d 51, 63 (Mo. banc 1987); *State v. Bowman*, 741 S.W.2d 10, 15 (Mo. banc 1987); *State v. Sandles*, 740 S.W.2d 169, 175 (Mo. banc 1987); and *State v. Guinan*, 732 S.W>2d 174, 178 (Mo. banc 1987). The point is denied.

XI.

Simmons alleges that the trial court erred in overruling his motion to strike the "depravity of mind" aggravating circumstance and in overruling his objection to Instruction 16, which submitted that aggravating circumstance to the jury. Simmons contends that the depravity of mind aggravating circumstance is unconstitutionally vague and that he is entitled to a new sentencing hearing because of its allegedly erroneous use.

The depravity of mind aggravator was submitted to the jury as follows:

> 4. Whether the murder of Shirley Crook involved depravity of mind and whether, as a result thereof, the murder was outrageously and wantonly vile, horrible, and inhuman. You can make a determination of depravity of mind only if you find:
>
> That the defendant killed Shirley Crook after she was bound by defendant and that defendant thereby exhibited a callous disregard for the sanctity of all human life.

This language is similar, in all material respects, to the "depravity of mind" aggravator at issue in *State v. Tokar*, 918 S.W.2d 753, 772 (Mo. banc

1996).[5] In *Tokar*, this Court determined that "the jury was specifically provided guidance on when they could find this aggravating circumstance." This Court has held that language and limiting instructions such as that in this case and in *Tokar* provide sufficiently narrow parameters to guide the jury and that the instruction not constitutionally vague. *Id. State v. Mease*, 842 S.W.2d 98, 113 (Mo. banc 1992), *cert. denied*, 508 U.S. 918, 113 S.Ct. 2363, 124 L.Ed.2d 269 (1993); *Sidebottom v. State*, 781 S.W.2d 791, 799 (Mo. banc 1989), *cert. denied*, 497 U.S. 1032, 110 S.Ct. 3295, 111 L.Ed.2d 804 (1990). The point is denied.

XII.

Rule 29.15 Issues

Simmons's Rule 29.15 motion contains numerous claims of ineffective assistance of trial counsel. We have exercised our discretion not to permit plain error review where counsel failed to preserve an alleged error for appellate review and the request for plain error review does not establish substantial grounds of prejudice on its face. Consistent with *State v. Brown*, we have reviewed each of the claims of ineffective assistance carefully and determined that those claims not individually addressed below offer no grounds upon which a reasonable probability of prejudice to Simmons from counsels' acts of failures to act could be founded. Because an individual analysis of these claims would

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[5]The only difference is that the aggravator in *Tokar* read "Bound or otherwise rendered helpless."

carry n o precedential value, they are denied without further discussion. Rule 84.16(b).

To prevail on a claim of ineffective assistance of counsel, the movant must establish by a preponderance of the evidence "that counsel failed to exercise the customary skill and diligence that a reasonably competent attorney would perform under similar circumstances, and that he was prejudiced thereby." *Moore v. State*, 827 S.W.2d 213, 215 (Mo. banc 1992); *Strickland v. Washington*, 466 U.S. 668, 687-89, 104 S.Ct. 2052 2064-65, 80 L.Ed.2d 674 (1984). Prejudice exists where there is a reasonable probability that the outcome of the proceeding would have been different but for counsel's ineffectiveness. *Strickland,* 466 U.S. at 694, 104 S.Ct. at 2068. Where trial counsel decides as a matter of trial strategy to pursue one evidentiary course to the exclusion of another, trial counsel's informed, strategic decisions not to offer certain evidence is not ineffective assistance. *Leisure v. State*, 828 S.W.2d 872, 875 (Mo. banc 1992). A motion court's determination will be overturned on appeal only if it is clearly erroneous. *State v. Whitfield*, 939 S.W.2d 361, 369 (Mo. banc 1997).

A.

Simmons claims that trial counsel was ineffective in failing to object during guilt phase closing argument when the state said

> Well, in that struggle [with Shirley Crook], [Simmons] won, but in this struggle he's not going to win because

> this struggle goes beyond what happened on September 9th of 1993. This struggle goes to what goes on every day in society. We have to take a stand and take control of our streets. [They're our] streets, [they're our] homes. If we can't be protected in our homes, we can't be protected anywhere. ***Do you think he wants you protected in your home?***

(Emphasis added.)

Simmons argues that the highlighted portion of the argument constitutes an improper personalization of the crime to the jury. It is, of course, improper for a prosecutor to suggest personal danger to the jurors or their families if the defendant should be acquitted. *State v. Storey*, 901 S.W.2d 886, 901 (Mo. banc 1995); *State v. Santonelli*, 914 s.W.2d 13, 15 (Mo. App. 1995).

The prosecutor's statement is a vague and ill-defined, near-non sequitur. It does not suggest personal harm to the jurors if Simmons is acquitted. In *Storey*, the state asked the jurors to put themselves in the victim's shoes and imagine the crime happening to them. *Storey*, 901 S.W.2d at 901. The prosecutor's statement here is substantially less personal than the argument condemned in *Storey*. Moreover, Simmons makes no showing or reasonable argument that the statement had a decisive effect on the outcome of the trial, given the evidence of Simmons's guilt.

Simons also maintains that the entire argument as set out above was an argument outside the record to

which his counsel should have objected. Simmons does not explain this claim sufficiently well for us to grasp its focus. Nevertheless, assuming that Simmons's argument is that the statement alleges that society's struggle with crime goes on every day, we have previously said that the prosecutor may argue the prevalence of crime in the community and may call on common experience in doing so. *State v. Clemmons*, 753 S.W.2d 901 (Mo. banc 1988).

Simmons goes to assert that the argument is impermissible because prosecutors may not urge a conviction in order to protect community values or deter future lawbreaking. Simmons is incorrect. The state may argue that the jury should send a message that society will not tolerate certain conduct. *State v. Cobb*, 875 S.W.2d 533, 537 (Mo. banc 1994).

B.

Simmons also claims trial counsel was ineffective in failing to object to the prosecutor's guilt-phase argument that "[n] matter how obviously guilty, he has a right to a fair trial. Folks, he had his day in court. The Judge has taken every precaution." Simmons argues that the statement is an improper comment about the prosecutor's opinion of Simmons's guilt, and that such a statement plays on the jury's susceptibility to believe the prosecutor, suggests the prosecution's possession of undisclosed matters relating to the crime, and undermines the jury's discretion.

The prosecutor may make statements that draw

a legitimate inference from the evidence but may not make statements that imply a knowledge of facts not before the jury. *State v. Whitfield*, 837 S.W.2d 503 (Mo.1992). The statement "no matter how obviously guilty" merely suggests that the evidence adduced at trial supports a finding of guilt; the statement does not suggest knowledge of outside facts, but highlights Simmons's own confession.

Simmons claims ineffective assistance of counsel resulted when the prosecutor referred to him as a "predator" and suggested he possessed an "evil mind" and trial counsel did not object. It is not error for a prosecutor to characterize a defendant and his criminal conduct as long as the evidence supports such a characterization. For example, in *State v. Carson*, 883 S.W.2d 534 (Mo.App.1994), the court did not fault the defense for failing to object to the prosecutor's characterization of the defendant as a "thug and bully." The court observed that the evidence showed that the victim was "jerked back real quick," hit in the back and shoved to the ground. This conduct, the court found, was "the work of a thug and bully." *Id.* at 536.

In this case, a reasonable person could find the deliberate, premeditated murder of Shirley Crook by throwing her from a bridge the work of a predatory person with evil motives. This is simply not a case where the prosecutor ascribed labels to the defendant that were totally unsupported by the evidence, as in *State v. Whitfield*, 837 S.W.2d 503 (Mo.1992) (finding insufficient evidence to label homicide defendant as a "mass murderer" and a "serial killer"), or where the prosecutor injected evidence of unrelated crimes, as in

State v. Burnfin, 771 S.W.2d 908 (Mo.App.1989). The motion court did not err in overruling Simmons's Rule 29.15 motion on these points relating to guilt phase closing argument.

C.

Simmons claims that his trial counsel was ineffective in failing to investigate and present evidence during the penalty phase relating to abuse Simmons suffered as a child, his alcohol and drug abuse, his mental illness, and threats made by Brian Moomey to Simmons and his family following Simmons's arrest.

At the crux of Simmons's claim of ineffective assistance of trial counsel is the role of Dr. Dañiel Cuneo. The Rule 29.15 hearing record shows that Simmons's counsel employed Dr. Cuneo to complete an evaluation as to Simmons's competency, sanity, and to determine the presence of mitigating factors for use in the penalty phase. Simmons claims that his attorneys' decision not to present evidence of Simmons's physical abuse at the hands of his stepfather, psychological abuse resulting from his bitterly divorced parents, and his own abuse of alcohol and drugs was not an informed decision. Simmons characterizes his attorneys' actions as a failure to investigate and concludes that a strategic decision that is not informed is not a strategic decision at all. Much of Simmons's claim in this regard results from his belief that there was serious miscommunication between his attorneys and Dr. Cuneo. He claims that Dr. Cuneo assumed that the attorneys would provide him all of the relevant

evidence necessary to formulate an opinion as to the presence of psychologically-based mitigating circumstances. He also claims that the attorneys assumed that Dr. Cuneo would conduct an independent investigation and would not rely solely on information provided by Simmons's attorneys.

It appears from our review of the record that the attorneys initially believed that absent compelling psychological evidence that might explain Simmons's homicidal behavior, Simmons stood a better chance with the jury if the penalty phase evidence attempted to play on the jury's sympathy and the impact on Simmons's family should he be put the death at the hands of the state. Dr. Cuneo's work--at least as it regarded mitigating circumstances--was designed to determine whether such compelling psychological evidence existed.

The motion court found Simmons's counsel thoroughly investigated Simmons's background.

> Mr. Crosby [one of the two trial counsel] indicated that he interviewed many individuals in preparation for Movant's defense. He testified that he interviewed one of Movant's counselor's [sic] at school, the principal and the assistant principal of Movant's school, Movant's parents, Movant's grandparents, a cousin, step-brothers, the father of Beth Simmons, Robert Hayes' sister, Joe Tessmer, Christy Brooks and Chris Brown. He indicated that he

> reviewed the school records of Movant and learned that his grades were not good and that his absenteeism was high and that several times [sic] disciplinary actions was [sic] imposed upon Movant. Mr. Crosby also indicated that he on several occasions spoke with an attorney, Mr. John Counts, who represented Charles Benjamin, a co-defendant in the criminal case.
>
> Mr. Crosby indicated he learned of Movant's use of marijuana and alcohol. He testified that the Movant's involvement in his use of marijuana and alcohol were not considered by him to be significant enough to demonstrate any impact on Movant's state of mind....
>
> Mr. Crosby testified that while Movant was in custody he met with him fifteen to twenty times and averaged one hour per visit. Movant denied to Mr. Crosby that Robert Hayes [movant's stepfather] abused him....
>
> * * * * * *
>
> Mr. Burton [one of the two trial counsel] testified that he mailed sixty letters to the individuals named by Movant. He testified *184 that he had interviewed Movant four or five times and he interviewed Movant's parents and several of his friends. He testified that he

spoke with several of Movant's school teachers and with one former employer through that employer's attorney.

In addition, Dr. Cuneo testified at the Rule 29.15 hearing about his conversations with Simmons's attorneys.

> A. [by Dr. Cuneo, upon cross-examination by the State] They asked me what my perceptions were. One of the things is that they were worried that his history of alcohol and drug abuse may not be helpful. My perceptions of Christopher at that time was he had borderline traits and his accounting to me of the alleged offense, I had stated was quite cold and they felt that if I thought that some of the mitigating factors would be important, i.e., the fact of his possible relationship with Brian Moomey; the fact of calling them Thunder Cats, the fact of having a kiddy gang that very well may have been supporting him although we never had any hard data on that; also the perception that the way he accounted the crime to me, or his accounting of the alleged offense or crime to me was extremely cold and that would not be in his best benefit to have that done. So we talked n I guess we talked for about an hour and hour and a half [sic] on the phone as to whether in fact I should pursue anything else. And they stated no.

> I called back later before trial to see if we wanted to and it was their decision at that point that there were some things that were bad that I could say. The bad that I could say would outweigh what I could say that could be helpful.

The decision not to pursue the psychological evidence was founded on Dr. Cuneo's initial report that identified no compelling mitigating circumstance. The motion court found:

> Mr. Burton outlined his plan for the penalty phase of trial. He indicated that he wanted to counter what the State's evidence was and to appeal to the sympathies of the jury and ensure the jury knew Movant was only seventeen. He intended to present the Movant as one who was liked or loved by his brothers, his mother, his father and Christy Brooks. He also sought the perspective testimony of other friends, school teachers or former employers but learned that none of them could offer anything substantive. In fact, some appeared to be intimidated by the charge pending against Movant and were unwilling to discuss anything positive about him. The plan included the intention to present Movant as a seventeen year old individual who had not yet had the opportunity to develop a series of good deeds but to some extent did do good for

one of his age. Another objective was to present some of Movant's family to demonstrate their sorrow in contemplating the possible recommendation of death. Mr. Burton believed that if the jury chose not to like Movant, they may choose to like his family and spare Movant's life for the family's benefit.

* * * * * *

Mr. Burton indicated that a decision was made to present no evidence regarding Movant's drug or alcohol use. He testified that he learned there was no alcohol consumed or drugs used at the time of the crime. Mr. Burton also learned of the strained relationship between Movant and his step-father. He indicated he believed that any information regarding this relationship would serve to work against Movant and therefore a decision was made not to present any of that evidence during the mitigation phase.

This strategic decision is made all the more reasonable when one considers--as did the motion court--the testimony offered by Dr. Robert Smith in support of Simmons's position at the Rule 29.15 hearing. After administering a battery of tests to Simmons and his parents and stepfather, and after extensive interviews with Simmons and with persons familiar with Simmons's upbringing, Dr. Smith

determined that Simmons had a borderline personality disorder and a schizotypal personality disorder. Missouri juries considering the death penalty have often rejected such testimony as the sort of compelling, psychological mitigating evidence that warrants a life sentence. *See, e.g., State v. Kreutzer*, 928 S.W.2d 854 (Mo. banc 1996) (jury recommends death penalty despite psychological testimony that defendant suffered from post- traumatic stress disorder and borderline personality disorder as a result of past emotional and physical abuse); *State v. Parker*, 886 S.W.2d 908 (Mo. banc 1994) (jury recommended death sentence after mental health expert testified to defendant's borderline personality disorder); and *State v. Duisen*, 428 S.W.2d 169 (Mo. banc 1967) (jury recommended death sentence after hearing evidence that defendant had a schizophrenic reaction of the paranoid type and anti-social behavior). Simmons's experienced trial counsel, no doubt aware of the likelihood of the success of the psychological evidence, chose a strategy they believed might give Simmons's better chance for a life sentence. That the strategy was not successful does not render its use ineffective assistance of counsel.

Simmons argues that *Eddings v. Oklahoma*, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982), requires the trial counsel to offer mitigating evidence of childhood abuse and severe emotional disturbance when the defendant is youthful. Despite Simmons's claim to the contrary, Eddings does not require that such evidence be placed before the jury during the penalty phase. In Eddings, the constitutional error was not the failure to put on mitigating evidence but the

failure of the sentencing court to consider it. Where trial counsel makes a reasoned decision not to place such evidence before the jury during the penalty phase, Eddings does not announce a per se rule mandating the submission of mitigating evidence solely because of a defendant's youth.

The motion court did not clearly err in denying Simmons's claims of ineffective assistance of counsel on this point.

D.

During the penalty phase, Mrs. Crook's husband, Steven, testified:

> But she was terrifically scared of height. It terrifies me to think of her being blindfolded and knowing that she was--because I feel that they would have talked about where they were going, and to be thrown off of a high spot would be really a terrible thing for her to--and then how she would feel about not being home when I come home. I know that as much pain as she would have been going through, I know she would have been worried about me, and worried about Kim and Randy and her mother. Her mother was ill.

Mrs. Crook's daughter, Kimberly Hawkins said:

> Like I said, I have dreams. I dream about

> how she--how I imagine she felt during all of this, what she thought. I can't imagine what she went through, the terror that she felt. I just--I have a picture in my mind that she can't see, she can't speak, she can't scream out, she can't get her hands on anybody, she's tied up, she's naked. You know, she never wanted to be unclothed. It just tore her down emotionally. Threw her in a van. I just imagine--I can imagine her feelings--you know--I can imagine that--I'm sure they were talking.
>
> I can imagine that she was being pushed over, and the freeness of the air. There's nothing below you, there's nothing holding you up. I can't imagine the terror that she's thinking, what's happening, what's going on, I can't see anything. Then I imagine her hitting the water. Does she know to take a breath? Does she know that's what was going to happen. Then you hit the water, and then you go in. And then if she had a breath that she held, how long could she hold it? Did it hurt? When the water came in, did it hurt?

Mrs. Crook's sister, Purdy Mitchell, read a prayer she had prepared and delivered at the family's first Thanksgiving after Mrs. Crook's murder.

> Dear God, we come together to remember,

to celebrate and give thanks. You have given us the gift of each other, and the love we share that you have planted in our hearts. By your gracious hand, we have received all that we have for our love and our hope and faith. We are grateful. We humbly ask you to grant your special graces to our family. May our homes be a place of peace and love and faith. We ask you, Dear God, to protect and bless all of us absent and present, living and dead. We wanted to put something in there that would kind of say Shirley without saying her name. Please bless this food, and bless us who are gathered here. In the name of Jesus, Amen.

Simmons claims his counsel was ineffective in failing to object to this testimony of the victim's family and that this failure resulted in a violation of Simmons's Eighth and Fourteenth Amendment rights.

1.

Payne v. Tennessee, 501 U.S. 808, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991), reversed the holdings of *Booth v. Maryland*, 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987), and *South Carolina v. Gathers*, 490 U.S. 805, 109 S.Ct. 2207, 104 L.Ed.2d 876 (1989), that the Eighth Amendment forbids the admission of victim impact evidence during the penalty phase of a capital trial in every instance. *Payne* expressly limited its holding to victim impact evidence. Because the

evidence in *Payne* did not extend to the victim's family's characterizations of and opinions about the crime, the Supreme Court did not reconsider *Booth's* holding that such evidence likewise violates the Eighth Amendment. *Payne*, 501 U.S. at 830, n. 2, 111 S.Ct. at 2611, n. 2.

The Supreme Court's Eighth Amendment jurisprudence has not beaten an easily- followed path, as the transition from *Booth* to *Gathers* to *Payne* shows. Pre-*Booth* decisions focus the Eighth Amendment inquiry on concerns "that the sentencing process should facilitate the responsible and reliable exercise of sentencing discretion" by the jury. *Caldwell v. Mississippi*, 472 U.S. 320, 328-29, 105 S.Ct. 2633, 2639, 86 L.Ed.2d 231 (1985). *Payne*, authored for the Supreme Court by Chief Justice Rehnquist, seems to reject Eighth Amendment concerns about reliability expressed in *Caldwell*, at least as to matters of evidence introduced at the sentencing phase. *Payne* adopts the view of then-Justice Rehnquist's *Caldwell* dissent that "there is no [Eighth Amendment] requirement that all information received by a sentencing jury be 'relevant.' " *Id.* at 351, 105 S.Ct. at 2651 (Rehnquist, J., dissenting).

Thus, it appears that post-*Payne*-Eighth-Amendment analysis applies to those situations in which penalty phase procedures operate to diminish the jury's sense of responsibility for its decision to impose death, *Caldwell*, or where the sentencer's discretion is not "suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." *Zant v. Stephens*, 462 U.S. 862,

874, 103 S.Ct. 2733, 2741, 77 L.Ed.2d 235 (1983). After *Payne*, reliability concerns that attach to matters of evidence during the penalty phase are considered under a due process rubric. "In the event that evidence is introduced that is so unduly prejudicial that it renders that trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief." *Payne*, 501 U.S. at 825, 111 S.Ct. at 2608. Simmons's Eighth Amendment argument is denied.

2.

Simmons claims that counsels' alleged ineffectiveness resulted in a violation of his right to due process. The test of a due process violation, as the preceding paragraph notes, is whether the evidence is so prejudicial that it renders the trial fundamentally unfair.

The evidence in this case did not offend the due process clause. Though an Eighth Amendment case, *Payne* makes clear that "there is nothing unfair about allowing a jury to bear in mind that harm [the defendant's acts had caused] at the same time as it considers the mitigating evidence introduced by the defendant." *Id.* at 826, 111 S.Ct. at 2609.

It is an affront to the civilized members of the human race to say that at sentencing in a capital case, a parade of witnesses may praise the background, character and good deeds of Defendant ... without limitation as to relevancy, but nothing may be said that bears upon the character of, or the harm imposed,

upon the victims.

Id., quoting State v. Payne, 791 S.W.2d 10, 19 (Tenn.1990). Moreover, Justice O'Connor's concurring opinion suggests that in light of "the jury's unavoidable familiarity with the facts [of the murder]," witness testimony at the sentencing phase describing the loss suffered by the victim's family does not violate due process where the statements of the witnesses do not inflame the passions of the jury beyond the passion that the facts of the crime itself inflames. *Payne*, 501 U.S. at 832, 111 S.Ct. at 2612 (O'Connor, J., concurring).

Steven Crook spoke about his wife's fear of heights and the terror that she must have felt. No one doubts that the jurors were moved by this testimony. But the jurors had already heard from Christopher Simmons himself about her abduction; the way she was bound; the manner in which she was thrown into the minivan; her struggle to free herself; Simmons's use of her own clothing and personal items to hog tie her; his decision to use duct tape to cover her face, restrict her breathing, and blind her. The jury would have known that she knew she was on railroad tracks because she had freed herself earlier and realized that a trestle lay ahead. As human beings, the jurors would have imagined the scene and felt what Shirley Crook felt as she struggled and fought for breath and was thrown and fell to her death. We doubt that Steven Crook could inflame the jurors more than Christopher Simmons did in his confession of the murder.

Kimberly Hawkins's testimony described the

impact of the manner of her mother's death on her. She did not describe the crime. She described the nightmares that came to her as part of her description (not fully set out in this opinion) of the broad impact her mother's murder had on her ability to work and rest and enjoy life. This, too, would have affected the jury. But this is "evidence of the specific harm caused by the defendant." *Payne*, 501 U.S. at 825, 111 S.Ct. at 2608. In this case, it is also evidence that balances the mitigation evidence put on by Simmons at the penalty phase--that his death at the hand of the state would injure his family. " '[J]ustice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true.' " *Payne*, 501 U.S. at 827, 111 S.Ct. at 2609, *quoting Snyder v. Massachusetts*, 291 U.S. 97, 122, 54 S.Ct. 330, 338, 78 L.Ed. 674 (1934).

Likewise, Purdy Mitchell's testimony spoke of the Shirley Crooks family's loss. This, too, is harm caused by the murder of which the jury may know. We do not find that her reading of the prayer rendered the sentencing phase of the trial fundamentally unfair when considered in the context of the statutory and nonstatutory mitigating and aggravating statutory circumstances presented by both parties during the penalty phase.

The motion court did not err in overruling the Rule 29.15 motion on these points.

E.

During the penalty phase closing argument, defense counsel argued

> I'll submit to you this: If you, as you sit here today, say to yourself, "You know, as far as Chris Simmons is concerned, the State's right; who cares about age; who cares about no significant history; who cares about the deeds he's done." You basically may say to yourself, "I don't care about Chris Simmons at all," and I'm not at all saying to you that that's the feeling you should have. You've heard all the good things that were said about a seventeen year old kid. Ladies and gentlemen of the jury, if, in fact, you do feel that way about Chris Simmons, then I'm not asking you here to render a life sentence for this kid over here. I'm asking you to give a life sentence for his family. Family and friends that basically have indicated to you, and shown you that a life sentence that you render is not the same in their eyes as the death penalty.
>
> Now, there's no question the State will come up here and say, "Well, you know, Chris Simmons is the one that did everything to his family." Don't you feel responsible for that situation, ladies and *188 gentlemen of the jury, but all I'm saying to you is consider his family. Consider his brothers. Consider the fact

> that just the fact that he's alive makes a difference to some people, and that, ladies and gentlemen of the jury, is certainly a mitigating circumstance that you should consider.

In response, the state's counsel argued

> Look at what his friends and family told you. Isn't that scary? Look at how he repaid their love. Look at what he's done to them, and they're asking you to spare his life so he can remain in prison as a constant reminder to them of the acts he did on that night. Show some mercy to his family, give him death. Look at his family. Look at his little brother. Kenny said it all. Someday I want to grow up to be just like him. To be just like him. Spare those kids of that.

Simmons's counsel did not object. Simmons insists this is ineffective assistance of counsel and contends that this argument offends the due process clause as interpreted by the Eighth Circuit's decision in *Antwine v. Delo*, 54 F.3d 1357 (8th Cir.1995). The state says that the prosecutor's words are acceptable retaliation. Both arguments are incorrect.

Although we doubt the rectitude of the Eighth Circuit's due process conclusions in Antwine,[6] the application of that court's due process analysis in this

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[6]*See Antwine v. State*, 791 S.W.2d 403 (Mo. banc 1990).

case does not lead to a reversal.

In *Antwine*, the state's lawyer argued that (1) the death by gas chamber was instantaneous, (2) that the taxpayers of the state ought not be required to support Antwine for "the next 50 years" in prison, and (3) it would be more humane to put Antwine to death "so that his brother can get on with his life, and so that the two children can get on with their lives" than to require them to think about their brother/father in prison every day. *Id.* at 1362- 3. The Eighth Circuit found it constitutionally significant that death by cyanide inhalation was not instantaneous and, as a result, the state's first comment diminished the jury's sense of responsibility by assuring Antwine a quick and easy death. "On this basis [the Eighth Amendment] alone, we hold that Antwine's sentence is constitutionally invalid." *Id.* at 1362.

After announcing this sufficient basis for its holding, a "separate basis for our holding" follows. *Id.* at 1364. The Eighth Circuit characterized the additional issue it addressed as whether the latter two comments (summarized in the preceding paragraph), "***combined with*** the misleading and unsupported description of instantaneous death, were prejudicial enough to render the entire sentencing proceeding fundamentally unfair and a violation of Antwine's right to due process." (Emphasis added.) *Id.* at 1363.

Continuing, *Antwine* embraced a due process analysis that requires consideration of four factors.

We must: (1) measure the type of

> prejudice that arose from the argument; (2) examine what defense counsel did in his argument to minimize the prejudice; (3) review jury instructions to see if the jury was properly instructed; and (4) determine it there is a reasonable probability that the outcome of the sentencing phase would have been different, taking into account all of the aggravating and mitigating circumstances.

Id. at 1363.

Under the *Antwine* rubric, the state's comment was improper--even as retaliation--because " 'it does not reflect the properly considered circumstances of the crime or the character of the individual.' " *Antwine*, 54 F.3d at 1364, *quoting Blair*, 916 F.2d 1310, 1323 (8th Cir.1990). Using the Eighth Circuit's language, the state's comment here was also "prejudicial,"[7] but not necessarily outcome determinative.[8]

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[7]This Court, however, has reserved use of the word "prejudicial" to mean outcome determinative. "Prejudicial" as we use it means a conclusion that trial error results in a reasonable likelihood that the jury would have reached a different result in the absence of the error. *State v. Parker*, 856 S.W.2d 331, 333 (Mo. banc 1993).

[8]*See Antwine*, 54 F.3d at 1363. ("[W]e found no due process violation when the prosecutor made a single, brief comment, even though that comment was so improper and prejudicial that we had 'no hesitation in condemning [it],' " *quoting Blair*, 916 F.2d at 1323.

It does not follow, however, that the state's comment requires a reversal of the death sentence. First, it is the combination of the instantaneous death argument--an Eighth Amendment violation--with the economic burden argument that offends the Eighth Circuit's constitutional sensibilities. In reaching its "separate basis" for reversal of the death sentence in *Antwine*, the court said

> There is no doubt that Antwine killed Eric "George" Jones in the police holding cell, but the two aggravating circumstances presented to the jury were balanced by some nonstatutory mitigating circumstances that could have led the jury to choose life imprisonment ***if the prosecutor had not fed their fears of economic burden while easing their conscience with the idea of a quick, humane death.***"

(Emphasis added.) Contrary to Simmons's assertion, *Antwine* does not rest on the state's comments about the defendant's family.

Second, we apply *Antwine's* four-stepped due process inquiry. (1) The state's challenged comment did not diminish the jury's sense of responsibility in imposing the death sentence. The state's argument focused the jury on the harsh reality of a death sentence on Simmons's family. This is the ground upon which defense counsel's strategy asked that the debate

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F.2d at 1323.

take place. That the state had a contrary view of what was best for the family did not diminish the jury's sense of the stark choice it faced. In fact, it heightened it. (2) Defense counsel raised the issue of the impact of the death sentence on Simmons's family initially in an attempt to persuade the jury that the family would suffer if the defendant died at the state's hand. The state's counterpoint must be read against Simmons's counsel's argument. When that is done, one cannot say that the jury deliberated without the benefit of a balanced argument. (3) The jury received instructions that reminded it that argument is not evidence. And as to the state's argument about what would be best for Simmons's family, nothing the state said could be misconstrued by the jury as factual evidence. The argument condemned in *Antwine* alluded to a factual basis for the belief that incarceration for life held an economic burden for taxpayers that the death penalty would relieve. (4) We find no reasonable probability that the jury would have reached a different decision on punishment if the state had not said the words Simmons now challenges. The state's argument falls into the *Blair* exception--constitutional foul without constitutional harm. In our parlance, we conclude that no prejudice to defendant resulted from the state's argument.

F.

During the penalty phase closing argument, the prosecutor said:

> Now, the Defendant is [sic] offered certain mitigating circumstances. The

> Court has instructed you that once you find those aggravating circumstances, which you have to find beyond any doubt--the evidence is overwhelming--that's a given--do those mitigating circumstances outweigh the four aggravating circumstances of what the Defendant has done to the victim and her family? You saw two stark contrasts this morning between the two families obviously in pain.
>
> There's one huge, enormous difference. His witnesses had to look at him when they testified. His witnesses get to visit him whether it's on Wednesdays or Sundays. His witnesses still have him. Shirley's don't. They don't have Wednesday visitation. They don't have Sunday visitation, and they certainly couldn't look at her in the courtroom. That's their cross that they are bearing. That's his choice. ***He chose the evidence that you are going to hear in this case. He chose it.***

(Emphasis added.) Simmons asserts that the emphasized portion of the argument (the only portion Simmons's brief quotes) is a prejudicial, indirect comment on his decision not to testify in the case, a violation of the Fifth and Fourteenth Amendment right to remain silent. Defense counsel did not object. Was this ineffective assistance, as Simmons claims?

We do not read the prosecutor's statement as a comment on Simmons's failure to testify. Read in context, the prosecutor's statement reflects a belief that Simmons chose to murder Shirley Crook and to do so in the manner in which he did. The prosecutor's argument places the blame for the pain and loss that both Simmons's family and the Crook family bore on Simmons's decision to commit murder. We find no intent to speak to Simmons's failure to testify in the state's argument, and thus no error. Therefore, counsel cannot be ineffective where the state's argument conformed to the law.

XIII.

Section 565.035.3 Review

Section 565.035.3, RSMo, requires this Court to determine

> (1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor; and
>
> (2) Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in subsection 2 of section 565.032 and any other circumstance found;
>
> (3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime, the strength of the evidence and the defendant.

A.

Simmons claims that the death penalty recommended by the jury and imposed by the trial court in this case was the result of the influence of passion, prejudice, or arbitrary factors. He claims that the victim impact evidence, the prosecutor's closing argument, and the prosecutor's alleged assertion that Simmons's age was an aggravating and not a mitigating factor all require a reversal of the death penalty. We have previously considered these claims. They are without merit.

In addition, Simmons's now claims that the jury's inability to hear evidence of his child abuse, psychological and emotional damage, drug and alcohol addiction, and his relationship with the felon, Brian Moomey, rendered the imposition of the death penalty arbitrary. We have previously determined that Simmons's counsels' decision not to focus on this evidence during the penalty phase was a reasonable strategic decision. Section 565.035.3 review does not require reversal of the death sentence because a reasonable strategic decision does not result in the outcome the defendant prefers.

B.

Simmons contends that the evidence is insufficient to support the jury's finding of the statutory aggravating circumstances. He bases this

argument on the grounds that his confession was illegally obtained. Absent the confession, there would be no evidence that he had murdered Shirley Crook either for pecuniary gain or to avoid lawful arrest. As discussed previously, Simmons's confession was not illegally obtained. Thus, there was ample evidence to support finding the two statutory aggravators in question.

As to the depravity of mind aggravator, Simmons again contends that this is unconstitutionally vague. Again, as we previously determined, the aggravator was not unconstitutionally vague and there was ample evidence to find that Simmons killed Shirley Crook after she had been bound. Simmons's arguments are meritless.

C.

Simmons claims that this Court's practice of proportionality review violates due process. This Court rejected a similar claim recently in *State v. Ramsey*, 864 S.W.2d 320 (Mo. banc 1993), *cert. denied*, 511 U.S. 1078, 114 S.Ct. 1664, 128 L.Ed.2d 380 (1994). The point is denied.

D.

Simmons next claims that the imposition of the death penalty is arbitrary because it is the product of unrestricted prosecutorial discretion. This Court rejected a similar argument in *State v. McMillin*, 783 S.W.2d 82 (Mo. banc 1990), *cert. denied*, 498 U.S. 881, 111 S.Ct. 225, 112 L.Ed.2d 179 (1990). We continue to

adhere to the views expressed in *McMillin*.

E.

Simmons also claims that Missouri's death penalty statute achieves no legitimate governmental goal and is therefore excessive. This Court rejected this argument is *State v. Newlon*, 627 S.W.2d 606 (Mo. banc 1982), *cert. denied*, 459 U.S. 884, 103 S.Ct. 185, 74 L.Ed.2d 149, *reh'g denied*, 459 U.S. 1024, 103 S.Ct. 391, 74 L.Ed.2d 520 (1982). The point is denied.

F.

Proportionality

In considering whether the death sentence imposed in this case is proportionate, we consider the death sentence imposed in other cases. The jury found three aggravating circumstances: that Simmons committed the murder for pecuniary gain, section 565.032.2(4); that Simmons committed the murder to avoid a lawful arrest, section 565.032.2(10); and that the murder involved depravity of the mind.

Where a murder has been committed for pecuniary gain and/or for the purpose of avoiding identification of the defendant by the victim, this Court has upheld the death sentence in *State v. Copeland*, 928 S.W.2d 828 (Mo. banc 1996); *State v. Kreutzer*, 928 S.W.2d 854 (Mo. banc 1996); *State v. Nunley*, 923 S.W.2d 911 (Mo. banc 1996); *State v. Weaver*, 912 S.W.2d 499 (Mo. banc 1995); and at least six other cases. In *State v. Tokar*, 918 S.W.2d 753 (Mo. banc

1996), the death penalty was recommended where the defendant exhibited depravity of mind by killing the victim while the victim had been bound. *See also State v. Oxford*, 791 S.W.2d 396, 402 (Mo.1990) (finding depravity of mind where the murder victim was bound and gagged with duct tape and beaten.) The death penalty has also been given in cases involving youthful offenders. *State v. Wilkins*, 736 S.W.2d 409 (Mo. banc 1987), and *State v. Richardson*, 923 S.W.2d 301 (Mo. banc 1996).

The death penalty imposed in this case is proportionate to the sentence imposed in similar cases. The point is denied.

XIV.

The judgment of guilt of first degree murder, the sentence of death and the judgment overruling the defendant's Rule 29.15 motion are affirmed.

All concur.

IN THE MISSOURI SUPREME COURT

STATE OF MISSOURI ex rel. CHRISTOPHER SIMMONS,	)
Petitioner,	)
vs.	) **No.**
	) **DEATH PENALTY**
AL LUEBBERS, Superintendent, Potosi Correctional Center,	) **CASE EXECUTION SCHEDULED: JUNE 5, 2002 12:01 A.M.**
Respondent.	)

WRIT SUMMARY

Identity of the parties and their attorneys in the underlying action, if any: none.

Nature of underlying action, if any: none.

Action of Respondent being challenged, including date thereof: Petitioner challenges Respondent's illegal detention of Petitioner under sentence of death. Such illegal detention began in 1994 and is continuing.

Relief sough by Relator or Petitioner: Petitioner request that his unlawful sentence of death be vacated.

Date case set for trial, if set, and date of any other event bearing upon relief sought (e.g., date of deposition or motion hearing): Petitioner is scheduled

to be executed on June 5, 2002 at 12:01 a.m.

IN THE MISSOURI SUPREME COURT

STATE OF MISSOURI ex rel. CHRISTOPHER SIMMONS,	)	
Petitioner,	)	
vs.	)	**No.**
	)	**DEATH PENALTY**
AL LUEBBERS, Superintendent, Potosi Correctional Center,	)	**CASE EXECUTION SCHEDULED: JUNE 5, 2002 12:01 A.M.**
Respondent.	)	

PETITION FOR WRIT OF HABEAS CORPUS

COMES NOW petitioner, Christopher Simmons, by and through counsel, Patrick J. Berrigan and Jennifer Brewer, and moves this Court pursuant to Rule 91 to issue its Writ of Habeas Corpus in this case granting relief to Mr. Simmons from his unconstitutional sentence of death. In support of his petition, Mr. Simmons states as follows:

FACTUAL BACKGROUND

1. Petitioner Christopher Simmons is currently confined by Al Luebbers, Superintendent, at Potosi Correctional Center, under sentence of death. (See attached warrant of execution) Following conviction for first degree murder and recommendation of a

sentence of death by a Jefferson County, Missouri jury, the court sentenced Mr. Simmons to death on August 19, 1994.

2. Christopher Simmons' attorney filed an amended petition for postconviction relief with the motion court on March 24, 1995. Following an evidentiary hearing, the court denied the postconviction relief motion on January 3, 1996. Mr. Simmons filed a notice of appeal with the Missouri Supreme Court on February 7, 1996. This Court affirmed the conviction and sentence in ***State of Missouri v. Christopher Simmons***, 944 S.W.2d 165 (Mo. 1997). A motion for rehearing was denied on May 27, 1997. Mr. Simmons then petitioned the United States Supreme Court for certiorari on July 2, 1997. The Court denied the petition on November 3, 1997 in ***Simmons v. Missouri***, 118 S.Ct. 376 (1997).

3. Mr. Simmons filed his petition for writ of habeas corpus in the United States District Court, Eastern District of Missouri, on July 15, 1998. The petition was denied in two parts, first on March 24, 1999, and finally on August 5, 1999. A motion to alter or amend the district court's March 24, 1999 judgment was denied on August 5, 1999. A motion to alter or amend the August 5, 1999 judgment was denied on September 28, 1999.

4. On September 7, 1999, Mr. Simmons filed a notice of appeal with the Eighth Circuit Court of Appeals. Following briefing and oral argument, the Eighth Circuit denied the appeal on January 2, 2001. On February 22, 2001, Mr. Simmons' petition for

rehearing and for rehearing en banc was denied. Chief Judge Wollman, Judge McMillian, and Judge Richard S. Arnold would have granted the petition.

5. On July 26, 2001, Mr. Simmons filed a Petition for Writ of Certiorari with the United States Supreme Court. That petition was denied on October 1, 2001. Application for rehearing of the petition was denied on February 19, 2002.

6. On April 2, 2002, the Missouri Supreme Court set an execution date of May 1, 2002. On April 24, 2002, the Missouri Supreme Court postponed the execution date to June 5, 2002. A clemency petition is currently pending with Governor Bob Holden. No other pleadings are currently pending.

7. Christopher Simmons' restraint is illegal and improper because such restraint violates the Eighth Amendment to the United States Constitution and Article I, §21 of the Missouri Constitution, which prohibit cruel and unusual punishment; and the Sixth and Fourteenth Amendments to the United States Constitution and Article I, §10 of the Missouri Constitution, which guarantee due process of law, in that these provisions prohibit the execution of any juvenile under eighteen years of age. No petition for the relief sought here has been made to any higher court than this Court.

SUGGESTION IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS

CHRISTOPHER SIMMONS'

SENTENCE O F DEATH VIOLATES THE EIGHTH AMENDMENT AND ARTICLE I, §21 OF THE MISSOURI CONSTITUTION'S BAN ON CRUEL AND UNUSUAL PUNISHMENT, AND THE DUE PROCESS CLAUSE OF THE SIXTH AND FOURTEENTH AMENDMENTS AND ARTICLE I, §10 OF THE MISSOURI CONSTITUTION, IN THAT A NATIONAL CONSENSUS, THE EVOLVING STANDARDS OF DECENCY AND THE DOCTRINE OF JUS COGENS NOW EXIST THAT EXPRESSLY FORBID EXECUTION OF JUVENILE OFFENDERS.

I. Evolving Standards of Decency Have Made the Execution of Juvenile Offenders Contrary to the Eighth Amendment

In ***Stanford v. Kentucky***, 492 U.S. 361, 380 (1989) (plurality opinion), the Court considered the constitutionality of the juvenile death penalty and concluded: "We discern neither a historical nor a modern societal consensus forbidding the imposition of capital punishment on any person who murders at 16 or 17 years of age." In the thirteen years since ***Stanford***, such consensus has developed. This is evidenced by the emerging "pattern of federal and state laws" towards abolition of the juvenile death penalty, by a growing and uncontroverted body of research providing that a juvenile's brain development is significantly undeveloped as compared to the adult brain, and by the number of respected organizations

that have taken a stance against the juvenile death penalty.

A. The emerging "pattern of federal and state laws" favors the abolition of the death penalty for those under the age of eighteen

In ***Stanford***, the Court concluded that when assessing contemporary standards of decency a primary consideration should be "the pattern of federal and state laws." ***Id***. at 373. Since ***Stanford***, Montana and Washington have both banned the execution of juvenile offenders. Most recently, in just March of this year, Indiana passed a law banning the execution of juvenile offenders. This brings the total to ***twenty-eight*** states that disallow the death penalty as an option for juvenile offenders. In addition, the federal government's 1994 federal death penalty act set the minimum age for death penalty eligibility at 18.

Every other legal trend in this area reflects a growing rejection of the death penalty for those under eighteen. This year, six states (in addition to Indiana) are considering or have considered legislation to bar the juvenile death penalty – Missouri, Kentucky, Mississippi, Arizona, Pennsylvania, Florida. Kentucky Governor Paul Patton said he would support the bill banning the execution of juveniles. The Florida senate passed the bill 34-0. Although not compelled to do so by law, Virginia overturned the death sentence of its only juvenile on death row within the last year. Furthermore, the reversal rate for death sentences imposed on juvenile offenders is 89%, and juvenile death sentences have dropped to only 2.7% of the total

number of death sentences imposed in the United States since 1973.

In addition to the legal trends, public policy shows the nation's "evolving standards of decency" have come to oppose the juvenile death penalty. In a 1994 study, only 35% of death-qualified mock jurors were willing to sentence 17-year-old defendants with the death penalty. A 2001 National Opinion Research Center study showed that 62% support the death penalty, but only 34% favor it for those committing murder when under the age of 18. In looking exclusively at the Midwest, the study revealed that only 31.5% favored the juvenile death penalty. Indeed, with Indiana's recent statute repealing the death penalty for juveniles, Missouri is the lone Midwestern state with the juvenile death penalty on its books.

B. Scientific Research Supports the Notion That Juveniles Do Not Have the Requisite Culpability to be Eligible for the Death Penalty

By their very nature, teenagers are less mature, and therefore less culpable, than adults who commit similar acts but have no such explanation for their conduct. Adolescence is a transitional period of life when cognitive abilities, emotions, judgment, impulse control, identity - even the brain - are still developing. Over the last five years, neuroscientific research has discovered that the adolescent brain is in fact far less finished than previously believed. One of the last parts of the brain to mature, the prefrontal cortex, is that part which controls the making of sound judgments and the calming of unruly emotions. At the same time,

the part of the brain where raw emotions such as anger are generated, is entering a stage of development that pushes it into overdrive.[1]

The prefrontal cortex is the supervisor of our brain. It enable us to regulate our thoughts and to decide whether to cultivate or dismiss them. It plans, strategizes, and envisions consequences. Abnormalities in the frontal lobe of adult brains are associated with adults who commit murder. It is the prefrontal cortex in "normal" adults that recognizes our violent thoughts and then dismisses them as wrong without acting on them. Unfortunately, this is the part of the brain that undergoes more change during adolescence than any other part of the brain.[2] As a result, adolescents do not have the capacity to use the prefrontal cortex nearly as much as the amygdala, the more emotional and aggressive part of the brain. Even the most sophisticated-appearing teenagers rely heavily on this emotional part of the brain, as MRI scans have shown.[3] In short, what we know now that we did not know at the time of ***Stanford*** is that

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[1]*See* Brownless, Shannon. "Inside the teen brain: Behavior can be baffling when young minds are taking shape." *Lewis-Clark State College*. Undated.

[2]Giedd, Jay. Interview with Public Broadcasting Services. *See* www.pbs.org/wgbh/Pages/frontline/shows/teenbrain/interviews/giedd.html.

[3]Yurgelun-Todd, Deborah. Interview with Public Broadcasting Services. *See* www.pbs.org/wgbh/pages/frontline/shows/teenbrain/interviews/nelson.html.

adolescents do not have the same ability as the rest of us to think about their thoughts, to judge them as right or wrong, and to stop them from guiding their behavior.

The adolescent's biological inability to control his actions is highly significant in the consideration of whether the death penalty is an appropriate punishment for juvenile offenders. One well-grounded principle of death penalty law holds "that punishment should be directly related to the personal culpability of the criminal defense." ***California v. Brown***, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring). Courts have long accepted the fact that adolescents are less mature and responsible than adults, and that therefore, less culpability should attach to a crime committed by a juvenile rather than an adult. *See* ***Thompson v. Oklahoma***, 487 U.S. 815, 834-35 (1988) (Stevens, J., plurality opinion). Scientific proof now exists to support this proposition. That proof demonstrates that this crucial brain development is continuing when the juvenile is 16 or 17 years old. Therefore, because juveniles under the age of 18 are, in fact, not capable of being as culpable as adults are, their execution violates due process and the prohibition against cruel and unusual punishment.

C. Missouri Laws Recognize that Juveniles Are Not Able to Handle the Responsibilities and Rights of Adults

Missouri recognizes the need for restricting the rights of the "less mature and responsible" juveniles

throughout its constitution and statutory scheme. For example, Article VIII, §2, of the Missouri Constitution provides that Missourians must be 18 years old before they are granted the right to vote. Likewise, Missouri citizens must be 21 years old before they can serve on a jury. Ironically, this means that, by law, not one member of the jury that convicted Chris and sentenced him to death cold have been a "jury of his peers." Our State's increasing recognition of the need to protect our juveniles was most recently seen in the drivers' licenses' statutes. The state originally granted the privilege to drive at the age of sixteen. Effective January 1, 2001, a new statute was put n place, allowing children between the ages of sixteen and eighteen to obtain only an "intermediate driver's license." Among other things, the "intermediate licence" requires that the juvenile have a permit for 6 months before the license can be obtained, and verification of at least 20 hours of supervised driving experience under this permit. Once the "intermediate license" is issued, the juvenile is still not allowed to drive between 1 a.m. and 5 a.m. until he turns 18 and gets his ordinary driver's license.

Other examples of Missouri statutes that seek to protect our children by restricting their rights are the marriage license statute, which requires parental consent to obtain a license for children under 18; the pornography statute that makes it a crime to distribute pornography to minors under the age of 18; and the state lottery statute that prohibits the sale of tickets to anyone under the age of 18. Finally, Missouri's refusal to give children the right to consume alcohol or to purchase tobacco, are probably the clearest examples

of our recognition that juveniles are not capable of acting with the same maturity and responsibility as adults. The State's clear and continuing recognition of the need to protect juveniles by restricting their rights, combined with the evolving standards of decency of our society as a whole, compels the conclusion that the execution of juveniles now runs afoul of the Eighth Amendment and Article I, §21 of the Missouri Constitution prohibiting cruel and unusual punishment. Any other conclusion is inconsistent with every other aspect of Missouri law.

D. The Juvenile Death Penalty is Uniformly Rejected by Children's Organizations Throughout the United States.

A number of organizations such as the American Bar Association, the Child Welfare League of America, the Children's Defense Fund, the National Center for Youth Law, the Juvenile Law Center, the Coalition for Juvenile Justice, the American Society for Adolescent Psychiatry, the American Academy for Child and Adolescent Psychiatry, the American Psychiatric Association, and the National Mental Health Association urge that the execution for a crime committed while a juvenile is simply unacceptable in a civilized society. This recognition by such respected organizations in our society speaks volumes as to how the standards of decency in our nation have evolved. *See* ***Stanford***, 492 U.S. at 388 ("Further indicators of contemporary standards of decency that should inform our consideration of the Eighth Amendment question are the opinions of respected organizations." (Brennan,

J., dissenting).

II. The Application of Capital Punishment to Juveniles is Anathema to Principles of International Law and is Forbidden by the Principle of *Jus Cogens*.

In continuing to execute juvenile offenders, the United States acts in defiance of substantial international consensus and law. Indeed, such executions have all but ended around the world, except in the United States. In the last decade, the United States has executed more juvenile offenders than all of the world's nations combined. The only other countries that still execute juveniles are Iran, the Democratic Republic of Congo and the United States (china, Yemen and Pakistan have recently abolished the use of capital punishment for juveniles). Furthermore, just this past year, Iran stated that it no longer executes juvenile offenders, while the leader of the Democratic Republic of Congo commuted the death sentences of four juvenile offenders.

The death penalty for juvenile offenders is expressly prohibited by the International Covenant on Civil and Political Rights (ICCPR), the U.N. Convention in the Rights of the Child (CRC), and the American Convention of Human Rights. This overwhelming tide of international sentiment against juvenile executions is highly relevant to the issue. ***Stanford v. Kentucky***, 492 U.S. at 389. ("Our cases recognize that objective indicators of contemporary standards in the form of legislation in other countries is also of relevance to Eighth Amendment analysis."

(Brennan, J., dissenting).

Since the end of World War II, the death penalty for juvenile offenders has been expressly prohibited by numerous international nroms, such as the provisions of the International Covenant on Civil and Political Rights ("ICCPR"),[4] the United Nations Convention on the Rights of the Child[5] and several other international agreements and treaties.[6] In ratifying the ICCPR, the U.S. Senate passed a resolution containing a "reservation" purporting to nullify the exclusions of juveniles from the death penalty. But the existence of such an international law norm is now incontrovertible and undeniable. Indeed, numerous sovereign governments, including Seden, The Netherlands, Finland, Germany, Denmark, Norway, France, Ital, Portugal, Belgium and Spain, filed "objections" to the

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[4]Article 6(5), Dec. 19, 1966 6 I.L.M. 368, 370 (entered into force Mr. 23, 1976) ("Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age. . .").

[5]Article 37(a), G.A. Res. 1386 (XIV), 14 U.N. GAOR Supp. No. 16 at 19, U.N. Doc. A/4354 (1959) ("Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age").

[6]See, e.g. American Convention on Human Rights, Article 4(5), Nov. 22, 1969, I.L.M. 673, 676 (entered into force July 18, 1978) ("Capital punishment shall not be imposed upon persons who, at the time of the crime was committed, were under eighteen years of age. . ."). The United States signed, but never ratified , the American Convention.

U.S. reservation, in that the reservation was diametrically opposed to the object and purpose of the Covenant itself.[7]

The prohibition on the execution of juvenile offenders is most clearly embodied in the Convention on the Rights of the Child, a multilateral treaty which the President of the United States has signed without reservation and which every organized nation in the world, except the United States, has ratified. It is also expressed in three other multilateral treaties the United States has ratified, including the ICCPR. This norm has been expressed or agreed to by every competent international body. It is followed by almost every other nation in the world, excluding the United States.

Almost every other country in the world adheres to one or more treaties forbidding juvenile executions. Therefore, a norm of *jus cogens* forbidding the capital punishment of juveniles may resolve differences between international law and those state jurisdictions that still subscribe to capital punishment of juveniles. *Jus cogens* is a principle that shapes and limits the legislative powers of sovereign nation-states. In particular, the principle restrains nations from transgressing upon those interests deemed based and fundamental to the international order. Accordingly, *jus cogens* norms protect the most compelling and essential interests of the international community and

---

[7]*See*, generally, William A. Schabas, *Invalid Reservations to the International Covenant on Civil and Political Rights: Is the United States Still A Party?*, 21 Brook. J. Int'l L. 277 (1995).

form the foundation of the international legal system. Because these norms preserve the fundamental interests of the community of nations, *jus cogens* norms invalidate all state actions that are inconsistent with their terms. Inherent in *jus cogens*, therefore, is the understanding that despite the justifications of state sovereignty, nation-states may not violate, by treaty or by practice, the compelling interests of the global community embodied in *jus cogens* norms.[8] Clearly, should the United States continue to allow the execution of juvenile offenders, the *jus cogens* norm against such practice would be impermissibly violated.

III. Conclusion

National and international trends, both legally and as a matter of public policy, make clear the fact that our standards of decency have evolved since the Supreme Court's 1989 decision in ***Stanford***. The execution of a seventeen-year-old juvenile offender now constitutes cruel and unusual punishment under the Eighth Amendment to the United States Constitution and Article I, §21 of the Missouri Constitution. Christopher Simmons' restraint under sentence of death is therefore illegal and improper. Only this Court's writ can cure this Constitutional violation.

WHEREFORE, petitioner Christopher Simmons respectfully requests that this Court issue its Writ of Habeas Corpus in this case vacating his unconstitutional sentence of death.

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[8](28 Geo. Wash. J. Int'l L. & Econ. 401)

R E S P E C T F U L L Y
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A T T O R N E Y S F O R
PETITIONER

CERTIFICATE OF SERVICE

Undersigned counsel hereby certifies that true and accurate copies of the foregoing "Writ Summary" and "Petition for Writ of Habeas Corpus" were mailed on this 2nd day of May, 2002 by regular U.S. Mail, postage prepaid, to:

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/s/ Jennifer Brewer
Counsel for Christopher Simmons

Supreme Court of Missouri

en banc

STATE OF MISSOURI, Respondent,	)	
vs.	)	No. SC77269
CHRISTOPHER SIMMONS, Appellant.	)	

WARRANT OF EXECUTION

Now on this day, Appellant, Christopher Simmons, being in custody pursuant to a sentence of death heretofore rendered against him by the Circuit Court of Jefferson County, and affirmed by this Court, it is therefore considered, ordered and adjudged by this Court that Christopher Simmons, be and remain in the custody of the Department of Corrections, and thereafter, on the 5th day of June, 2002, under the supervision and direction of the director of said department, shall suffer death. Said director is directed to make return of this warrant to this Court showing the time, mode and manner in which this warrant was executed.

STATE OF MISSOURI-Sct.

I, THOMAS F. SIMON, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the January Session thereof, 2002, and on the 24th day of April,

2002, in the above entitled cause.

Given under my hand and seal of said Court, at the City of Jefferson, this 24th day of April, 2002.

_____
Clerk

_____D.C.

IN THE SUPREME COURT OF MISSOURI
EN BANC

September Session 2002

State ex rel. Christopher Simmons,
Petitioner,

vs. No. SC84454 **WRIT OF HABEAS CORPUS**

Al Luebbers, Superintendent,
Potosi Correctional Center,
Respondent,

THE STATE OF MISSOURI
to
AL LUEBBERS, Superintendent,
Potosi Correctional Center,
GREETINGS:

You are hereby commanded that you file return to the Supreme Court of Missouri, en Banc, at Jefferson City, Missouri, showing the time and cause of detention of Christopher Simmons, who is in your custody detained, as it is said, under safe and secure conduct.

You are further COMMANDED that the production of the person of the petitioner, Christopher Simmons is waived, but you should file your written return with the Supreme Court of Missouri, en Banc, at the Supreme Court Building, in the City of Jefferson, on or before **December 11, 2002**, thereafter

to do and receive what shall then and there be adjudged concerning the said Christopher Simmons, so by you detained as aforesaid, and hereof fail not at your peril, on date aforesaid.

Given under my hand and seal of said Court, at the City of Jefferson, this 26th day of November, 2002.

_____

Clerk

_____D.C.

(25)

No. 03-633

IN THE
SUPREME COURT OF THE UNITED STATES

DONALD P. ROPER,
Superintendent, Potosi Correctional Center,

Petitioner,

vs.

CHRISTOPHER SIMMONS,

Respondent.

On Petition for Writ of Certiorari to the
Missouri Supreme Court

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Does the Missouri Supreme Court's decision in ***State of Missouri ex rel. Christopher Simmons v. Donald Roper***, 112 S.W.3d 397 (Mo. banc 2003), which bans the execution of juveniles in the State of Missouri and effects no one other than Christopher Simmons, present the compelling reasons required to trigger this Court's certiorari review?

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OPINIONS BELOW

Petitioner Donald Roper seeks this Court's certiorari review of the Missouri Supreme Court's decision in ***State of Missouri ex rel. Christopher Simmons v. Donald Roper***, 112 S.W.3d 397 (Mo. banc 2003).

BASIS FOR JURISDICTION

This Court has jurisdiction over this case under 28 U.S.C. §1257(a). The Missouri Supreme Court's decision was announced on August 26, 2003. Petitioner filed a timely petition for certiorari review with this Court on October 24, 2003.

STATUTORY PROVISIONS AND RULES INVOLVED

This case involves the Missouri Statute defining murder in the first degree:

> 1. A person commits the crime of murder in the first degree if he knowingly causes the death of another person after deliberation upon the matter.
>
> 2. Murder in the first degree is a class A felony, and the punishment shall be either death or imprisonment for life without eligibility for probation or parole, or release except by act of the governor; except that, if a person has not reached his sixteenth birthday at the time of the commission of the crime, the punishment shall be imprisonment for life without eligibility for probation or parole, or release except by act of the governor.

Mo. Rev. Stat. §565.020 (1994).

This case also involves the Missouri Supreme Court rule allowing for a petition for writ of habeas corpus:

> Any person restrained of liberty within this state may petition for a writ of habeas corpus to inquire into the cause of such restraint.

Missouri Supreme Court Rule 91.01(b).

STATEMENT OF THE CASE

On September 9, 1993, the body of Shirley Crook was found in the Meramec River in St. Louis County. On September 10, 1993, 17-year-old Christopher Simmons[1] was arrested at his high school for the crime. His trial on the charge of first degree murder began on June 13, 1994. The jury returned a verdict of guilty and the penalty phase to determine punishment took place on June 17, 1994. The jury returned a sentence of death, finding the following aggravating circumstances to support such sentence: (1) murder for money, (2) murder to prevent lawful arrest, and (3) depravity of mind. The trial court sentenced Chris Simmons to death on August 19, 1994.

Mr. Simmons sought postconviction relief in the Missouri Supreme Court following his conviction and sentence. The appeal began with Mr. Simmons filing his pro se Motion to Vacate, Set Aside, or Correct the Judgment or Sentence with the trial court on January 17, 1995. Appointed counsel filed a first amended motion and request for an evidentiary hearing on March 24, 1995. An evidentiary hearing was held on the motion on August 18, October 6, 23-24, and November 1, 1995. The motion did not raise the issue of Chris Simmons' juvenile status at the time of his death sentence. That motion was denied by the trial court on January 3, 1996.

Mr. Simmons then sought direct appeal relief from the Missouri Supreme Court by filing a notice of appeal on February 7, 1996. The Missouri Supreme Court denied the appeal and affirmed the conviction and sentence in ***State of Missouri v. Christopher Simmons***, 944 S.W.2d 165 (Mo. 1997). The court denied a motion for rehearing on May 27, 1997. Chris Simmons then petitioned this Court for certiorari on July 2, 1997. The

[1] Christopher Simmons was born on April 26, 1976.

Court denied the petition on November 3, 1997 in ***Simmons v. Missouri***, 118 S.Ct. 376 (1997). This appeal did not challenge the constitutionally of the juvenile death sentence.

Mr. Simmons filed his petition for writ of habeas corpus in the United States District Court, Eastern District of Missouri, on July 15, 1998. That petition, and two motions for reconsideration, was finally denied on September 28, 1999. Mr. Simmons appealed the denial of his petition to the Eighth Circuit Court of Appeals. That court denied relief in ***Simmons v. Bowersox***, 235 F.3d 1124 (8th Cir. 2001). Mr. Simmons sought certiorari review from this Court. The Court denied the petition for certiorari on October 1, 2001. The habeas corpus proceedings in federal court did not raise the issue of the constitutionality of executing a 17-year-old offender.

The Missouri Supreme Court set an execution date of May 1, 2002, and then reset the date for June 5, 2002. On May 3, 2002, Mr. Simmons filed a petition for writ of habeas corpus with the Missouri Supreme Court, alleging for the first time that his death sentence was illegal because he was a juvenile at the time of his crime. On May 28, 2002, the Missouri Supreme Court stayed Mr. Simmons' execution pending this Court's decision in ***Atkins v. Virginia***. Following that decision, the Missouri Supreme Court ordered that the parties file suggestions as to how ***Atkins*** applied to Mr. Simmons' case. On November 26, 2002, the Missouri Supreme Court issued a Writ of Habeas Corpus, and ordered briefing on the issue. Following briefing and oral argument, the Missouri Supreme Court issued its opinion prohibiting the execution of juveniles in Missouri. Petitioner seeks this Court's certiorari review of that opinion.

ARGUMENT

Supreme Court Rule 10 provides that "[a] petition for a writ of certiorari will be granted only for compelling reasons. . . . A petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." (emphasis added) The Missouri Supreme Court's opinion is simply the application of the federal legal rule on the issue of what constitutes cruel and unusual punishment, as interpreted and applied by this Court in ***Stanford v. Kentucky***, 492 U.S. 361 (1989), and ***Atkins v. Virginia***, 536 U.S. 304 (2002). The opinion creates no conflict with this Court's precedent. Furthermore, while the Missouri Supreme Court's decision in Mr. Simmons' case is without question an important decision for Mr. Simmons, the decision has little impact on federal law, or even on other Missourians, and therefore presents no compelling reason for this Court's discretionary review. For these reasons, the Court should not now exercise its discretion and grant certiorari on this issue.

The Missouri Supreme Court's Decision is a Proper Application of this Court's Legal Rule for Evaluating Evolving Standards of Decency

Petitioner complains that the Missouri Supreme Court's decision is "diametrically opposed" to this Court's holding in ***Stanford***, and not supported by the holding in ***Atkins***. (Petition, p. 10) Petitioner seeks certiorari review to correct the Missouri court's error in ignoring this Court's precedent and applying its own "subjective" standards of decency. This is a mischaracterization of the Missouri court's opinion. The Missouri court's opinion in no way modified the Eighth Amendment legal rule established in ***Stanford*** and applied again in ***Atkins***. Instead, it merely applied this Court's rule and, under the facts before it, reached a result different from the factual determination in ***Stanford***. ***Simmons***

v. Roper, 112 S.W.3d 397, 406-07 (2003). Such action in no way interferes with this Court's prerogative to set federal constitutional standards and, thus, does not provide a basis for certiorari review.

The fact that the Missouri court acted properly in undertaking the task of applying the facts before it to this Court's established Eighth Amendment rule is evidenced by other decisions in which the lower courts have performed the same task. In ***State ex rel. Holmes v. Honorable Court of Appeals for the Third District***, 885 S.W.2d 389 (Tex. Crim. App. 1994), the court applied this Court's rule in ***Herrera v. Collins***, 506 U.S. 390 (1993). In ***Herrera***, this Court considered whether newly discovered evidence of actual innocence entitled petitioner to federal habeas relief under the Due Process Clause of the Fourteenth Amendment and the prohibition against cruel and unusual punishment in the Eighth Amendment. The Court answered "no," concluding that "[n]o matter what the Court might say about claims of actual innocence today, petitioner could not obtain relief. The record overwhelmingly demonstrates that petitioner deliberately shot and killed Officers Rucker and Carrisalez." ***Id.*** at 417, 419, 421. (O'Connor, J., joined by Kennedy, J., concurring)

Relying on the majority of the ***Herrera*** Court's view that the execution of a person who could prove his innocence would violate the Constitution, the ***Holmes***' court held that the defendant claiming actual innocence should be given an opportunity to demonstrate that, based upon the newly discovered evidence, "it is probable that the verdict would be different." ***Holmes***, at 398. The Texas court has since used this Eighth Amendment standard that was enunciated in ***Herrera***, and applied in ***Holmes***, to grant

relief where the facts compelled such result. *See* ***Ex parte Elizondo***, 947 S.W.2d 202, 210 (Tex. Crim. App. 1996).

Likewise, in ***Oregon v. Kennedy***, 456 U.S. 667 (1982), this Court announced the rule that the double jeopardy clause barred the retrial of a criminal defendant whose conviction was secured by prosecutorial misconduct that goaded the defendant into seeking a mistrial. Relying on the ***Kennedy*** Court's logic, the court in ***State v. Colton***, 663 A.2d 339 (Conn. 1995), concluded that the double jeopardy clause similarly prohibited retrial under the facts of that case. In ***Colton***, the prosecutorial misconduct had not resulted in a mistrial, but the court held that the ***Kennedy*** rule nonetheless barred retrial. The court reasoned:

> We can see no principled justification for a distinction between prosecutorial misconduct that is clandestine, and therefore not discoverable until after a verdict or an appeal, and prosecutorial misconduct that is visible, and so can be remedied by a motion for mistrial or on direct appeal.

Colton, at 347. This Court denied certiorari in ***Colton***, 516 U.S. 1140 (1996). Certainly, if this Court had felt that the ***Colton*** court's actions in applying ***Kennedy*** to the facts before it somehow interfered with the Court's right to determine federal law, certiorari

would have been granted to quash this unauthorized exercise of power.[2]

The Missouri Supreme Court's decision is immediately distinguishable from those cases in which this Court has granted certiorari review to correct overbroad interpretation of the federal constitution by state courts. *See* ***Arkansas v. Sullivan***, 532 U.S. 769 (2001); ***Oregon v. Hass***, 420 U.S. 714 (1975). Indeed, it is instructive that petitioner has omitted to cite these cases, because they so clearly set the limits of novel state court interpretation of the federal constitution, and also are so clearly inapplicable to the Missouri Supreme Court's action in ***Simmons***.

In ***Arkansas v. Sullivan***, this Court held that, while "a State is free as a matter of its own law to impose greater restrictions on police activity than those this Court holds to be necessary upon federal constitutional standards, [it] may not impose such greater restrictions as a matter of federal constitutional law when this Court specifically refrains from imposing them." ***Sullivan***, 532 U.S. at 772 (quoting ***Hass***, *supra*, 420 U.S. at 719). This Court thereby rejected the Arkansas Supreme Court's conclusion to the contrary, that "there is nothing that prevents [a state high court] from interpreting the U.S.

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[2] A look at ***Oregon v. Kennedy***, reveals that this Court granted review in that case because it found that the Oregon Supreme Court had taken an "overly expansive view of the double jeopardy clause." ***Kennedy***, 456 U.S. at 668-69 (1982). That overly expansive view, in brief, was that retrial should be barred under the Double Jeopardy Clause of the Fifth Amendment if a defendant successfully seeks a mistrial based upon prosecutorial "overreaching." Essentially, this Court held that "overreaching" was not enough. For a double jeopardy bar to be appropriate, a reviewing court would have to find that the prosecutor intentionally misbehaved in order to cause the defense to seek the mistrial. ***Colton*** took this standard and applied it to covert misconduct. This Court seems to have concluded that, whereas the Oregon court's decision was "overly expansive," the Connecticut court's decision was not. The difference would be, it appears, that the Oregon court tried to set a **legal standard** that was less exacting for the defendant than this Court though it should be. The Connecticut court, on the other hand, merely applied the legal standard in ***Oregon v. Kennedy*** to a new factual scenario. The Missouri court did the same thing in ***Simmons***.

Constitution more broadly than the United States Supreme Court, which has the effect of providing more rights." ***State v. Sullivan***, 16 S.W.3d 551, 552 (Ark. 2000).

The Arkansas Supreme Court — significantly unlike the Missouri Supreme Court in ***Simmons*** — transgressed this Court's federal constitutional prerogative by issuing a ruling contrary to this Court's well-defined legal standards when it held that a police officer's subjective motivation was relevant to determining the reasonableness of an arrest and search. This Court described the Arkansas decision as diametrically opposed to its legal standards that (1) subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis and that (2) a traffic-violation arrest will not be rendered invalid by the fact that it was a mere pretext for a narcotics search. ***Sullivan***, 532 U.S. at 772 (citing and quoting ***Whren v. United States***, 517 U.S. 806, 812-13 (1996), and ***United States v. Robinson***, 414 U.S. 218 (1973)).

The Missouri Supreme Court, by way of stark contrast, faithfully applied the legal standards of ***Stanford*** and ***Atkins*** to hold that the evolved standards of decency as of 2003, when considered in light of ***Stanford*** and ***Atkins***, properly support Eighth Amendment relief. The court made no claim to be *"more broadly" interpreting the United States Constitution* than this Court. Its decision objectively does not *impose greater restrictions as a matter of federal constitutional law*. The court does not hold on its own, for example, that certain objective indicia of evolving standards are to be deemed more relevant than they were in ***Stanford***. The Court, instead, firmly bases its legal standards (where they may vary in emphasis from ***Stanford***) on this Court's opinion in ***Atkins***. ***Simmons***, 112 S.W.3d at 408 (noting ***Atkins'*** emphasis on "consistency of

change"); 411 (relevance of the opinion of social, professional, and religious groups);[3] and 412 (relevance of independent examination of the social purposes intended by the death penalty).[4]

The Missouri Supreme Court acted in the same manner as the courts in ***Holmes*** and ***Colton***. The court applied the Eighth Amendment legal rule stated in ***Stanford*** and again in ***Atkins*** to the facts before the court. The court took care to follow the application of the rule in the exact way of the ***Atkins'*** Court, following the ***Atkins'*** Court logic step by step and citing to the exact language of the ***Atkins'*** Court in enunciating the legal rule. In ***Stanford***, the Court concluded that under the facts presented to it, the Eighth Amendment was not violated. Using the same test, the ***Atkins'*** Court concluded that under those facts, the Eighth Amendment was violated. The ***Simmons'*** court likewise concluded, using the same test, that the Eighth Amendment was violated. There is nothing extraordinary about this result.

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[3] The Missouri Supreme Court applied Stanford in ***Atkins*** as follows:

> While ***Stanford*** found the opposition of social, professional, and religious groups to be of little importance, the Court's more recent decision in ***Atkins*** clearly demonstrated a shift back to reliance on such evidence to confirm the national consensus that evolving standards of decency proscribe imposition of the death penalty on the mentally retarded. ***Atkins***, 536 U.S. at 316 n.21. Similarly, here, although by no means dispositive, we find the opposition to the juvenile death penalty of the wide array of groups within the United States listed above to be consistent with the legislative and other evidence that current standards of decency do not permit the imposition of the death penalty on juveniles. We also find of note that the views of the international community have consistently grown in opposition to the death penalty for juveniles.

Simmons, 112 S.W.3d at 411.

[4] The ***Simmons'*** Court notes that ***Stanford*** found examination of the social purposes irrelevant, but it adopts the arguments made in ***Thompson*** and ***Eddings*** in light of ***Atkins'*** clear acceptance of their relevance. ***Simmons***, 112 S.W.3d at 411-12 & n.19.

Christopher Simmons is the Only Person Affected by the Missouri Court's Decision

At the time of the Missouri Supreme Court's decision, there were two juveniles on Missouri's death row, Christopher Simmons and Antonio Richardson. Because Mr. Richardson was sentenced to death by a judge rather than a jury, his sentence was commuted to life based on this Court's decision in ***Ring v. Arizona***. Now, of the 56 men on Missouri's death row, none of them were under the age of eighteen at the time of the commission of their crimes. Furthermore, counsel's research has uncovered no cases anywhere in the State of Missouri in which the state was seeking the death penalty against a juvenile at the time of the court's decision in Mr. Simmons' case. Due to the extremely limited impact of the Missouri Supreme Court's decision -- petitioner's protestations to the contrary -- it cannot be said that this issue is of great importance to the State of Missouri.

Petitioner implores this Court to grant certiorari by asserting that the issue is important due to the number of juveniles sent into the adult criminal court and the number of those juveniles who were charged with murder. (Petition, p. 16) Petitioner ignores the relevant statistics, which go to the heart of the issue here, as to how often the juvenile death penalty is used. Those statistics tell a different story. In recent years the number of youths under the age of eighteen that have been sentenced to death in the United States has sharply declined, as the following chart indicates:[5]

[5] The source of the chart is Streib, Victor L., *The Juvenile Death Penalty Today: Death Sentences and Executions for Juvenile Crimes, January 1, 1973 - December 15, 2003*, Table 4, page 9. The report is available online at http://www.law.onu.edu/faculty/streib/JuvDeathDec15,2003.pdf.

Year	Number of Juvenile Death Sentences
1993	7
1994	17
1995	13
1996	12
1997	8
1998	11
1999	14
2000	7
2001	7
2002	4
2003	2

Likewise, the number of juveniles actually executed in this country is nearing extinction. In 2003, only one juvenile was executed.[6] Since 1993, only 18 juveniles have been executed out of approximately 674 executions carried out in this period.[7] The imposition

[6] Scott Hain was executed on April 3, 2003 in Oklahoma. *See* Streib, *The Juvenile Death Penalty Today*, Tables 1 and 2, pp. 4-5.

[7] *Ibid.*, at Table 2, p. 5.

and actual use of the juvenile death penalty affects relatively no one.[8] Therefore, this Court's extraordinary review is not compelled in Mr. Simmons' case.

Petitioner also seeks review on the basis that the Missouri Supreme Court's decision eliminates the "clear constitutional rule" enunciated in this Court's decision in ***Stanford v. Kentucky***, 492 U.S. 361 (1989). (Petition, p. 16) Petitioner exaggerates the power of the Missouri court's decision. The decision in Mr. Simmons' case affects *only* Missouri (and in fact, as discussed above, *only* Chris Simmons). Obviously, the Missouri Supreme Court cannot, and does not pretend to, change the federal law as determined by this Court. Certiorari review is not warranted.

CONCLUSION

WHEREFORE, respondent Christopher Simmons respectfully requests that this Court enter its Order denying the petition for writ of certiorari in this case.

[8] The exception to this statement is the State of Texas, where TWENTY-EIGHT juveniles currently sit on death row -- three with execution dates in 2004 following Fifth Circuit review (Edward Capetillo [March 30], Efrain Perez [June 23], and Raul Villareal [June 24]. *See* Streib, *supra*, Appendix B. These juveniles may well have an argument that the issue is one of public importance rather than chiefly of importance to the parties, because of Texas' almost unique willingness to actually execute juvenile offenders. This Court will have the opportunity to consider granting certiorari review on the Eighth Amendment issue in petitions that currently have been filed on behalf of Anzel Jones (another Texas juvenile currently without an execution date; No. 03-7779 on this Court's docket) and Brian Capetillo (no docket number available yet). Raul Villareal has filed a motion for leave to file an out-of-time certiorari petition which also raises the Eighth Amendment issue (No. 03M37, to be conferenced January 9th). To the best of the undersigned's knowledge, the petition of Efrain Perez, presently pending conference (No. 03-7156 on this Court's docket), does not present the Eighth Amendment issue.

RESPECTFULLY SUBMITTED,

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Supreme Court, U.S.
FILED
JAN 5 - 2004
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(3)

No. 03-633

In the
SUPREME COURT OF THE UNITED STATES

DONALD P. ROPER,
Superintendent, Potosi Correctional Center,
Petitioner,

v.

CHRISTOPHER SIMMONS,
Respondent.

Petition for Writ of Certiorari
to the Supreme Court of Missouri

REPLY TO BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW
(Capital Case)

The Supreme Court of Missouri departed from this Court's holding in *Stanford v. Kentucky*, 492 U.S. 361 (1989), in which the Court upheld statutes under which the minimum age for capital punishment is sixteen. The Missouri court's decision raises two questions:

1. Once this Court holds that a particular punishment is not "cruel and unusual" and thus barred by the Eighth and Fourteenth Amendments, can a lower court reach a contrary decision based on its own analysis of evolving standards?

2. Is the imposition of the death penalty on a person who commits a murder at age seventeen "cruel and unusual," and thus barred by the Eighth and Fourteenth Amendments?

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ARGUMENT

Respondent Simmons attempts to minimize the significance of the Missouri Supreme Court's decision with regard to both questions posed in the petition. His attempt fails. He is unable to dispute that the Missouri Supreme Court claims for lower courts the right to reinterpret what is "cruel and unusual." He is unable to dispute that the holding in *Stanford v. Kentucky*, 492 U.S. 361 (1989), is no longer good law in Missouri – though it remains the rule in other states, despite repeated petitions to have this Court reconsider it. And his statistical evidence demonstrates that this petition presents a question with current and future implications beyond the scope of his case, and beyond the borders of the State of Missouri.

1. Respondent first attempts to minimize the significance of the Missouri Supreme Court's assumption of authority to unilaterally "update" this Court's Eighth Amendment jurisprudence. In his view, the Missouri court merely "appli[ed] the federal legal rule on the issue of what constitutes cruel and unusual punishment." Brief in Opposition at 4. To make that claim, he must recharacterize the "legal rule" in *Stanford*.

In *Stanford*, this Court held that the Missouri statute that set 16 as the minimum age for capital punishment did not impose a "cruel and unusual" punishment. Respondent would have the Court now ignore that holding, and instead create a rule out of the rationale used to reach it. Then Respondent would permit all lower courts to apply that rationale to reach holdings contrary to those of this Court. But there is no authority in *Stanford* – nor in *Atkins v. Virginia*, 536 U.S. 304 (2002), on which the Missouri court relied – that delegates such power to lower courts.

Searching for precedents that would support his claim that this Court allows lower courts to revisit its Eighth Amend-

ment holdings, Respondent cites two instances in which state courts tackled issues that arose under this Court's precedents. But neither is analogous to what the Missouri Supreme Court did here.

In *State ex rel. Holmes v. Honorable Court of Appeals for the Third District*, 885 S.W.2d 389 (Tex. Crim. App. 1994), the state appellate court applied this court's decision in *Herrera v. Collins*, 506 U.S. 390 (1993). According to the Texas court, in *Herrera* "six members of the Supreme Court . . . recognized the execution of an innocent person would violate the Fourteenth Amendment." 885 S.W.2d at 397. The court held that given that conclusion, the defendant could use a state habeas petition as a means of addressing actual innocence. But unlike the Missouri court here, the Texas court did not purport to bypass, revise, or update *Herrera*. It is hardly surprising that in *Holmes* there was no petition for a writ of certiorari from this Court.

In *State v. Colton*, 663 A.2d 339 (Conn. 1995), cert. denied, 516 U.S. 1140 (1996), the Connecticut Supreme Court construed *Oregon v. Kennedy*, 456 U.S. 667 (1982). But like the Texas court in *Holmes*, the Connecticut court did not depart from this Court's holding. As Respondent here correctly states (Brief in Opposition at 6), the Connecticut court had before it a situation that this Court had not addressed in *Kennedy*, *i.e.*, prosecutorial misconduct that was analogous to that in *Kennedy*, but that was "clandestine," not "visible." 663 A.2d at 347. And the Connecticut court considered that situation in response to a claim that the defendant had been improperly denied "the opportunity to create a record" that "'the misconduct of the prosecutor [was] undertaken not simply to prevent an acquittal but to prevent an acquittal that the prosecutor believed at the time was likely to occur in the absence of his misconduct.'" *Id.* at 347-48, quoting *United States v. Wallach*, 979 F.2d 912, 916 (2d Cir. 1992), cert. denied, 508 U.S. 939 (1993). Prosecutorial

intent was at the core of the *Kennedy* test; it was not some new test developed in *Colton* as a departure from *Kennedy*.

Neither *Holmes* nor *Colton* was, of course, an Eighth Amendment case. Respondent remains unable to cite any precedent for delegating to lower courts the power to reconsider what the Eighth Amendment bars as "cruel and unusual," and unable to explain how our system could fairly deal with the differences that such delegation would inevitably produce. Indeed, Respondent entirely omits discussion of the results of differing rules across the nation, or of permitting rules to change – either to bar or to permit particular punishments – at the choice of individual courts in each and every state, territory, and federal circuit.

2. Respondent next attempts to minimize the impact of the Missouri court's particular holding, arguing that the Court should decline review because he is the only person affected. Literally, of course, Respondent is right; the "decision in Mr. Simmons' case affects *only* Missouri (and in fact . . . *only* Chris Simmons)." Brief in Opposition at 12. But that claim ignores the precedential value of the decision of a state's highest court. And it ignores the fact that the decision is precedent not just as to the question of capital punishment for those who act just before turning 18, but as to which courts will determine what constitutes "cruel and unusual" punishment.

To claim this case is unique, Respondent also argues that no Missouri prosecutor is currently seeking capital punishment against a person who was under age 18 at the time the person murdered; thus, he concludes, the decision of the court below is unimportant. Brief in Opposition at 10. That conclusion makes sense only to one who is blind to the future. It ignores the possibility – indeed probability – of future, perhaps even more egregious, crimes committed by those not yet 18. It ignores the deterrent effect of the death penalty –

indeed, it would give substance to Respondent's claim, made as he recruited accomplices, that he could "get away with it." And it ignores the need to give potential criminals, prosecutors, and legislators clear and consistent constitutional rules.

3. Lastly, Respondent contends that capital punishment of those who were under eighteen at the time they murdered is statistically unimportant. Brief in Opposition at 10-11. But Respondent's own chart shows that between 1993 and 2003, 102 offenders who had murdered at ages sixteen and seventeen were sentenced to receive capital punishment. Brief in Opposition at 11. Respondent points out the historically high use of juvenile capital punishment since 1993. Respondent contends that "eighteen juveniles have been executed out of the approximately 674 executions carried out" between 1993 and 2003, approximately 2.7%, a high rate compared to the historically 2% attributed to juvenile executions since 1608. Brief in Opposition at 10-12, citing Streib, Victor L., *The Juvenile Death Penalty Today: Death Sentences and Executions for Juvenile Crimes, January 1, 1973 - December 15, 2003*, at 4 (viewed Jan. 5, 2004, at http://www.law.onu.edu/faculty/streib/juvdeath.htm). And he asserts that 28 "juveniles sit on death row" in Texas alone. Brief in Opposition at 12 n. 8.

Those statistics do not minimize the important of the second question posed in the petition. They prove, at the very minimum, that there are many who are subject to capital punishment in states other than Missouri, whose sentences would be deemed unconstitutional if reviewed in Missouri courts – an inequity that Respondent can neither minimize nor justify.

CONCLUSION

For reasons stated above and in its petition for writ of certiorari, petitioner prays the court grant the petition.

Respectfully submitted,

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January 5, 2004

(7)

Supreme Court, U.S.
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No. 03-633
(CAPITAL CASE)

In the
SUPREME COURT OF THE UNITED STATES
October Term, 2003

DONALD P. ROPER,
Superintendent, Potosi Correctional Center,
Petitioner,

v.

CHRISTOPHER SIMMONS,
Respondent.

On Writ of Certiorari
to the Supreme Court of Missouri

JOINT APPENDIX

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Petition for Certiorari filed October 24, 2003
Certiorari Granted January 26, 2004

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No. 084454

State ex rel. Christopher Simmons,	)
Petitioner,	)
vs.	)Original Proceeding: HABEAS
Al Luebbers, Superintendent, Potosi Correctional Center,	) CORPUS
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2002

May 3	Petition for writ of habeas corpus filed, w/s.
May 9	Respondent's suggestions in opposition filed with service.
Jun 20	Order issued: The parties are requested to file suggestions with respect to the applicability of the decision of the Supreme Court of the United States in Atkins v. Virginia, No. 00-8452, to the petition in this case as it relates to the age of the petitioner at the time of the offense and any other issue to which the decision relates. Petitioner's suggestions shall be filed on or before July 22, 2002. Respondent's suggestions shall be filed on or before August 12, 2002. Reply suggestions, if any, shall be filed on or before August 22, 2002.
July 22	Motion for leave to file Amicus suggestions of American Civil Liberties Union filed with service.
July 23	Motion for leave to file Amicus Suggestions of American Civil Liberties Union sustained. Suggestions of American Civil Liberties Union filed with service.
July 23	Petitioner's motion for leave to file suggestions one day out of time filed with service and sustained.
July 23	Petitioner's suggestions filed with service.
Aug. 12	Respondent's supplemental suggestions in opposition to petition for writ of habeas corpus filed with service.
Aug. 22	Petitioner's reply to Respondent's supplemental suggestions in opposition to petition for writ of habeas corpus filed with service.
Aug. 30	Respondent's motion for leave to file a second supplemental suggestions in opposition to petition for writ of habeas corpus filed with service.
Aug. 30	Respondent's motion for leave to file a second supplemental suggestions in opposition to petition for writ of habeas corpus sustained.
Aug. 30	Respondent's second supplemental suggestions in opposition to petition for writ of habeas corpus filed with service.

Oct. 23	Respondent's motion for leave to file his third supplemental suggestions in opposition to petition for writ of habeas corpus filed with service and sustained.
Oct. 23	Respondent's third supplemental suggestions in opposition to petition for writ of habeas corpus filed with service.
Nov. 7	Petitioner's reply to Respondent's second and third supplemental suggestions n opposition to petition for writ of habeas corpus filed by leave of Court.
Nov. 26	Petition for writ of habeas corpus sustained. Writ of habeas corpus ordered to issue returnable to Court en Banc in fifteen days (due 12-11-02).
Dec. 11	Writ return/answer filed with service.

2003

Jan. 8	Petitioner's motion for extension of time to file opening brief filed, with service.
Jan. 9	Petitioner's motion for extension of time to file brief sustained until January 17, 2003. Petitioner's brief is now due on or before January 17, 2003.
Jan. 15	Cause docketed for oral argument on March 5, 2003.
Jan. 21	Petitioner's motion for leave to file brief one day out of time filed with service and sustained. Petitioner's brief filed with service.
Feb. 10	Respondent's brief filed, with service.
Feb. 18	Petitioner's motion for additional oral argument time filed with service.
Feb. 18	Petitioner's motion for additional time for oral argument overruled.
Mar. 3	Petitioner's request to file reply brief out of time filed, w/s, and sustained.

Mar. 3	Petitioner's reply brief filed, with service.
Mar. 5	Argued and submitted.
Aug. 26	Opinion by Stith, J. Sentence of death set aside resentenced to life imprisonment without eligibility for probation, parole, or release except by act of the Governor. White, C.J., Wolff and Teitelman, JJ., concur; Wolff, J., also files separate concurring opinion; Price, J., dissents in separate opinion filed; Benton and Limbaugh, JJ., concur in opinion of Price, J.
Sept. 12	Certified copy of opinion and mandate sent to Donald P. Roper, Superintendent, Potosi Correctional Center.

INSTRUCTION NO. 1

Those who participate in a jury trial must do so in accordance with established rules. This is true of the parties, the witnesses, the lawyers, and the judge. It is equally true of jurors. It is the Court's duty to enforce those rules and to instruct you upon the law applicable to the case. It is your duty to follow the law as the Court gives it to you.

However, no statement, ruling, or remark that I may make during the trial is intended to indicate my opinion of what the facts are. It is your duty to determine the facts and to determine them only from the evidence and the reasonable inferences to be drawn from the evidence. In this determination, you alone must decide upon the believability of the witnesses and the weight and value of the evidence. In determining the believability of a witness and the weight to be given to testimony of the witness, you may take into consideration the witness' manner while testifying; the ability and opportunity of the witness to observe and remember any matter about which testimony is given; any interest, bias, or prejudice the witness may have; the reasonableness of the witness' testimony considered in the light of all of the evidence in the case; and any other matter that has a tendency in reason to prove or disprove the truthfulness of the testimony of the witness.

Faithful performance by you of your duties as jurors is vital to the administration of justice. You should perform your duties without prejudice or fear, and solely from a fair and impartial consideration of the whole case.

INSTRUCTION NO. 2

You must not assume as true any fact solely because it is included in or suggested by a question asked a witness. A question is not evidence, and may be considered only as it supplies meaning to the answer.

From time to time the attorneys may make objections. They have a right to do so and are only doing their duty as they see it. You should draw no inference from the fact that an objection has been made.

If the Court sustains an objection to a question, you will disregard the entire question and you should not speculate as to what the answer of the witness might have been. The same applies to exhibits offered but excluded from the evidence after an objection has been sustained. You will also disregard any answer or other matter which the Court directs you not to consider and anything which the Court orders stricken from the record.

The opening statements of attorneys are not evidence. Also, you must not consider as evidence any statement or remark or argument by any of the attorneys addressed to another attorney or to the Court. However, the attorneys may enter into agreements or stipulations of fact. These agreements and stipulations become part of the evidence and are to be considered by you as such.

INSTRUCTION NO. 13

The law applicable to this stage of the trial is stated in these instructions and Instructions No. 1 and 2 which the Court read to you during the first stage of the trial. All of these instructions will be given to you to your jury room for use during your deliberations on punishment.

You must not single out certain instructions and disregard others or question the wisdom of any rule of law.

The Court does not mean to assume as true any fact referred to in these instructions but leaves it to you to determine what the facts are.

In these instructions, you are told that, in order to consider the death penalty, you must find beyond a reasonable doubt certain propositions relating to aggravating circumstances. The burden of causing you to find these propositions beyond a reasonable doubt is upon the state.

A reasonable doubt is a doubt based upon reason and common sense after careful and impartial consideration of all the evidence in the case.

Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the truth of a proposition. The law does not require proof that overcomes every possible doubt. If, after your consideration of all the evidence, you are firmly convinced that a proposition is true, then you may so find. If you are not so convinced, you must give the defendant the benefit of the doubt and must not find such proposition to be true.

INSTRUCTION NO. 14

You found the defendant guilty of murder in the first degree. At this stage of the trial it will be your duty to determine within the limits prescribed by law the punishment which must be imposed for that offense.

The punishment prescribed by law for murder in the first degree is either death or imprisonment for life by the Division of Corrections without eligibility for probation or parole.

INSTRUCTION NO. 15

At this stage of the trial, the law requires that certain circumstances be considered in making your decision as to the punishment to be imposed. We will proceed as follows:

First, the attorneys will have an opportunity to make a statement outlining any additional evidence to be presented. Such evidence may then be introduced.

After that, the Court will instruct you as to the circumstances you should consider in determining the punishment.

Then the attorneys may make their arguments.

You will then go to the jury room, deliberate, and arrive at your verdict.

INSTRUCTION NO. 16

In determining the punishment to be assessed against the defendant for the murder of Shirley Crook, you must first unanimously determine whether one or more of the following aggravating circumstances exists:

1. Whether the murder of Shirley Crook, was committed for the purpose of receiving money or any other thing of value.

2. Whether the murder of Shirley Crook was committed while the defendant was engaged in the perpetration of the felony of burglary.

3. Whether the murder of Shirley Crook was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest of defendant.

4. Whether the murder of Shirley Crook involved depravity of mind and whether, as a result thereof, the murder was outrageously and wantonly vile, horrible, and inhuman. You can make a determination of depravity of mind only if you find:

That the defendant killed Shirley Crook after she was bound by defendant and that defendant thereby exhibited a callous disregard for the sanctity of all human life.

You are further instructed that the burden rests upon the state to prove at least one of the foregoing circumstances beyond a reasonable doubt. On each circumstance that you find beyond a reasonable doubt, all twelve of you must agree as to the existence of that circumstance.

Therefore, if you do not unanimously find from the

evidence beyond a reasonable doubt that at least one of the foregoing circumstances exists you must return a verdict fixing the punishment of the defendant at imprisonment for life by the Division of Corrections without eligibility for probation or parole.

INSTRUCTION NO. 17

If you find and believe from the evidence beyond a reasonable doubt that one or more of the aggravating circumstances submitted in Instruction No. 16 exists, it will then become your duty to decide whether the aggravating circumstances are sufficient to warrant the imposition of death as punishment of defendant. In deciding that question, you may consider:

1. All of the evidence relating to the murder of Shirley Crook.

2. Any of the aggravating circumstances referred to in Instruction No. 16 which you found beyond a reasonable doubt.

If you do not unanimously find from the evidence beyond a reasonable doubt that those aggravating circumstances you have found warrant the imposition of death as defendant's punishment, you must return a verdict fixing his punishment at imprisonment for life by the Division of Corrections without eligibility for probation or parole.

INSTRUCTION NO. 18

If you decide that one or more sufficient aggravating circumstances exist to warrant the imposition of death, as submitted in Instruction No. 16, each of you must then determine whether one or more mitigating circumstances exist which outweigh the aggravating circumstance or circumstances so found to exist. In deciding that question, you may consider all of the evidence relating to the murder of Shirley Crook.

1. Whether the defendant has no significant history of prior criminal history.

2. The age of the defendant at the time of the offense.

3. The kind acts that the defendant conducted for his family and friends.

You may also consider any circumstances which you find from the evidence in mitigation of punishment.

It is not necessary that all jurors agree on the existence of the same mitigating circumstance. If each juror finds one or more mitigating circumstance sufficient to outweigh the aggravating circumstances found to exist, then you must return a verdict fixing defendant's punishment at imprisonment for life by the Division of Corrections without eligibility for probation or parole.

INSTRUCTION NO. 19

You are not compelled to fix death as the punishment even if you do not find the existence of one or more mitigating circumstances sufficient to outweigh the aggravating circumstances which you find to exist. You must consider all the circumstances in deciding whether to assess and declare the punishment at death. Whether that is to be your final decision rests with you.

INSTRUCTION NO. 20

You will be provided with forms of verdict for your convenience. You cannot return any verdict as the verdict of the jury unless all twelve jurors concur in and agree to it, but it should be signed by your foreman alone.

If you unanimously decide, after considering all of the evidence and instructions of law given to you, that the defendant must be put to death for the murder of Shirley Crook, your foreman must write into your verdict all of the aggravating circumstances submitted in Instruction No. 16 which you found beyond a reasonable doubt.

If you unanimously decide, after considering all of the evidence and instructions of law, that the defendant must be punished for the murder of Shirley Crook by imprisonment for life by the Division of Corrections without eligibility for probation or parole, your foreman will sign the verdict form so fixing the punishment.

When you have concluded your deliberations you will complete the applicable form to which all twelve jurors agree and return it with all unused forms and the written instructions of the Court.

If, after due deliberation, you are unable to agree upon the punishment, your foreman will sign the verdict form so stating. In such case, the Court will fix the defendant's punishment at death or imprisonment for life by the Division of Corrections without eligibility for probation or parole. You will bear in mind, however, that under the law, it is the primary duty and responsibility of the jury to fix the punishment.

INSTRUCTION NO. 21

The attorneys will now have the opportunity of arguing the case to you regarding the punishment to be imposed. Their arguments are intended to help you in understanding the evidence and applying the law, but they are not evidence.

You will bear in mind that it is your duty to be governed in your deliberations by the evidence as you remember it, the reasonable inferences which you believe should be drawn therefrom, and the law as given in these instructions.

It is your duty to render such verdict under the law and the evidence concerning the punishment to be imposed as in your reason and conscience is true and just.

The state's attorney must open the argument. The defendant's attorney may then make his argument. The state's attorney may then reply. No further argument is permitted by either side.

A-18

VERDICT

(Jurors: Use this form only if the punishment you now assess and declare is death. See Instruction No. 20 for directions as to what must be written on this verdict form. The foreman's signature must appear after the aggravating circumstance.)

As to Count I, we, the jury, having found the defendant Christopher Simmons guilty of murder in the first degree of Shirley Crook, now assess and declare the punishment at death. We have found the following aggravating circumstances beyond a reasonable doubt.

1. The murder of Shirley Crook, was committed for the purpose of receiving money or any other thing of value.

3. The murder of Shirley Crook was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest of dependent.

4. The murder of Shirley Crook involved depravity of mind and, as a result, thereof, the murder was outrageously and wantonly vile, horrible, and inhuman. the murder involved the depravity of mind because the defendant killed Shirley Crook after she was bound by defendant and that defendant thereby exhibited a callous disregard of all human life.

\s\ Wayne K. Sven

A-19

VERDICT

(Jurors: Use this form only if the punishment you now assess and declare is imprisonment for life without eligibility for probation or parole.)

As to Count I, we, the jury, having found the defendant Christopher Simmons guilty of murder in the first degree of Shirley Crook, now assess and declare the punishment at imprisonment for life without eligibility for probation or parole.

_____

Foreman

VERDICT

(Jurors: Use this form only if the you are unable to decide or agree upon the punishment. You will bear in mind, however, that under the law it is your primary duty and responsibility to fix the punishment.)

As to Count I, we, the jury, having found the defendant Christopher Simmons guilty of murder in the first degree of Shirley Crook, are unable to decide or agree upon the punishment.

_____

Foreman

STATE of Missouri, Respondent,

v.

Christopher SIMMONS, Appellant.

No. 77269.

Supreme Court of Missouri,
En Banc.

April 29, 1997.

Rehearing Overruled May 27, 1997.

ROBERTSON, Judge.

A jury convicted Christopher Simmons of first-degree murder and recommended that he be sentenced to death for the abduction and murder of Shirley Crook. The trial court sentenced Simmons to death. Simmons appeals, raising numerous points challenging the propriety of his conviction and death sentence and his counsels' performance. Simmons filed a timely Rule 29.15 motion which the trial court overruled. This Court's exclusive appellate jurisdiction is founded on article V, section 3 of the Missouri Constitution. We affirm the judgment of conviction and sentenced and the denial of relief under Rule 29.15.

I.

Facts

Simmons does not challenge the sufficiency of the evidence to support his conviction. We recite the facts only in sufficient detail to reconstruct the factual environment in which

the legal issues arise.

In early September 1993, Christopher Simmons, then age 17, discussed with his friends, Charlie Benjamin (age 15) and John Tessmer (age 16), the possibility of committing a burglary and murdering someone. On several occasions, Simmons described the manner in which he planned to commit the crime: he would find someone to burglarize, tie the victim up and ultimately push the victim off a bridge. Simmons assured his friends that their status as juveniles would allow them to "get away with it." Simmons apparently believed that a "voodoo man" who lived in a nearby trailer park would be the best victim. Rumor had it that the voodoo man owned hotels and motels and had lots of money despite his residence in a mobile home park.

On September 8, 1993, Simmons arranged to meet Benjamin and Tessmer at around 2:00 a.m. the following morning for the purpose of carrying out the plan. The boys met at the home of Brian Moomey, a 29-year-old convicted felon who allowed neighborhood teens to "hang out" at his home. Tessmer met Simmons and Benjamin, but he refused to go with them and returned to his own home. Simmons and Benjamin left Moomey's and went to Shirley Crook's house to commit a burglary.

The two found a back window cracked open at the rear of Crook's home. They opened the window, reached through, unlocked the back door, and entered the house. Moving through the house, Simmons turned on a hallway light. The light awakened Mrs. Crook, who was home alone. She sat up in bed and asked, "Who's there?" Simmons entered her bedroom and recognized Mrs. Crook as a woman with whom he had previously had an automobile accident. Mrs. Crook apparently recognized Simmons as well.

Simmons ordered Mrs. Crook out of her bed and, when she did not comply, Simmons forced her to the floor with Benjamin's help. While Benjamin guarded Mrs. Crook in the bedroom, Simmons found a roll of duct tape, returned to the bedroom, and bound her hands behind her back. The two also taped Mrs. Crook's eyes and mouth shut. They walked Mrs. Crook from her home and placed her in the back of her minivan. Simmons drove the van from Mrs. Crook's home in Jefferson County to Castlewood State Park in St. Louis County.

At the park, Simmons drove the van to a railroad trestle that spanned the Meramec River. Simmons parked the van near the railroad trestle. He and Benjamin began to unload Mrs. Crook from the van and discovered that she had freed her hands and had removed some of the duct tape from her face. Using Mrs. Crook's purse strap, the belt from her bathrobe, a towel from the back of the minivan, and some electrical wire found on the trestle, Simmons and Benjamin bound Mrs. Crook, restraining her hands and feet and covering her head with a towel. Simmons and Benjamin walked Mrs. Crook to the railroad Trestle. There, Simmons bound her hands and feet together, hog-tie fashion, with the electrical cable and covered Mrs. Crook's face completely with duct tape. Simmons then pushed her off the railroad trestle into the river below. At the time she fell, Mrs. Crook was alive and conscious. Simmons and Benjamin threw Mrs. Crook's purse into the woods and drove the van back to the mobile home park across from the subdivision in which Mrs. Crook lived.

Later that day, Simmons went to Moomey's trailer and bragged to Moomey that he had killed a woman "because the bitch seen my face." In the meantime, Steven Crook, Shirley's husband, returned home from an overnight trip and discovered that his wife had not gone to work as scheduled. When he did not hear from his wife by that evening, he filed a missing persons report.

That same afternoon, two fishermen found a body floating in the Meramec River, three quarters of a mile downstream from the railroad trestle. The fishermen notified authorities, who removed the body. The medical examiner identified the body from finger-prints, determined the cause of death as drowning and noted that the victim was alive prior to being pushed from the bridge. The examiner also reported that Mrs. Crook had sustained several fractured ribs and considerable bruising and that these injuries did not result from her fall from the railroad trestle.

The next day, September 10, police received information that Simmons was involved in the murder. They arrested Simmons at his high school and took him to the Fenton, Missouri, police department. Police read Simmons the warnings required by *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). Simmons waived his constitutional rights and, after a little less than two hours of questioning, confessed to the murder. He also agreed to videotape a confession and to take part in a videotaped "reenactment" of the murder at the crime scene.

The Jefferson County prosecutor charged Simmons with first-degree murder, burglary, kidnapping and stealing. The trial court severed the last three charges for trial purposes. Simmons sought a change of venue. The trial court refused but agreed to transfer a jury from Cape Girardeau County into Jefferson County to hear the case due to the substantial publicity the crime had received in Jefferson County.

The jury found Simmons guilty of first-degree murder and recommended the death sentence. The trial court sentenced Simmons to death. Simmons filed a Rule 29.15 motion, which his appointed public defender amended in a timely fashion. Following an evidentiary hearing, the motion court overruled Simmons's rule 29.15 motion. Simmons appealed the

conviction, his sentence, and the denial of post-conviction relief.

II.

Venue

Simmons contends that venue did not lie in Jefferson County, but rather in St. Louis County, and that the trial court erred in not transferring the case to St. Louis County or, alternatively, dismissing the charges. Although the burglary and abduction occurred in Jefferson County, Crook's death took place in St. Louis County and thus, Simmons argues, venue lies in St. Louis County.

For support, Simmons cites *State v. Harvey*, 730 S.W.2d 271 (Mo.App. 1987). *Harvey* is inapposite. It holds that ***jurisdiction*** of a murder is properly ***in the state*** in which the defendant delivered the fatal wound or blow.

Venue of homicides is governed by section 565.001.4, RSMo 1994. *State v. Lingar*, 726 S.W.2d 728, 732 (Mo. banc 1987). That statute provides that, in instances where the offense is committed partly in one county and partly in another or where the elements of the crime occur in more than one county, the defendant may be prosecuted in any of the counties where any element of the offense occurred.

Appellate review of this question focuses on whether one can reasonably infer from the facts and circumstances that the crime occurred within the trial court's venue. *Lingar* at 732. The evidence shows that Simmons broke into Shirley Crook's home in Jefferson County, found her there, and believed she would recognized him because he had an automobile accident that involved Mrs. Crook. Simmons bound Mrs. Crook in Jefferson County, placed her in her van in Jefferson County,

and drove to the railroad trestle spanning the Meramec River in St. Louis County, bearing the intent to kill her he had formed in Jefferson County.

Deliberation is an element of first degree murder. Section 565.020.1, RSMo 1994. This Court observed in *Lingar* that the conclusion that the defendant had deliberated the crime within a county is sufficient to establish venue in that county under section 565.001.4. *Lingar,* 726 S.W.2d at 732. *See also Leisure v. State*, 828 S.W.2d 872, 879 (Mo. banc 1992) (finding that deliberation and premeditation within St. Louis City made venue proper although death occurred outside the city limits).

From the evidence, it is reasonable to conclude that Simmons deliberated the crime in Jefferson County. This finding is sufficient to establish venue in Jefferson County under section 565.001.4. The point is denied.

III.

Jury Selection

A.

Simmons assigns error to the trial court's decision to sustain the state's challenges for cause to two venirepersons who expressed a discomfort with and uncertainty about the death penalty, claiming a violation of his Sixth Amendment right to an impartial jury.

When a prospective juror's views on the death penalty would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and oath," *Wainwright v. Witt*, 469 U.S. 412, 424, 105 S.Ct. 844, 852, 88 L.Ed.2d 841 (1985), the trial court may exclude the juror for cause. The trial court must determine whether the views expressed by a prospective juror will prevent or substantially

impair performance of a juror's duties, subject to appellate review for abuse of discretion. On review, the trial court is afforded great deference because of its superior ability to "interpret and evaluate a venireman's answers and demeanor." *State v. Leisure*, 749 S.W.2d 366, 374 (Mo. banc 1988).

Venireperson Judith Fluegge indicate that her father was a minister, that his teachings emphasized that "it's wrong to take someone's life," and that she would be very uncomfortable considering the death penalty as a punishment option. At her moment of greatest assurance about her ability to impose the death penalty - a moment brought about by defense counsel's attempt to qualify her for the jury - Ms. Fluegge said that she would be willing to listen to evidence as to why she should consider the death penalty and that she could "possibly" consider imposing the death penalty.

Venireperson Laura Hecht also expressed reservations about the death penalty, doubting her ability to concentrate on the evidence with the possibility of participating in a penalty phase deliberation involving the death penalty awaiting her. Her strongest commitment to considering the full range of penalties came when she said in response to defense counsel's inquiry that she "possibly could, yes" consider the death penalty.

We discover no abuse of the trial court's discretion in its decision to sustain the state's challenges for cause to these two venirepersons on the basis of their indecision and, specifically as to Ms. Hecht, on account of her doubts about her ability to concentrate on the evidence. The points are denied.

B.

During voir dire, the state asked:

"Is there anybody here for the sole fact of the defendant's age could not sit in judgment in this case?"

"You're not saying that just because of his age you would never consider [the death penalty]? You would be able to at least consider it?"

"And is your position that because of the Defendant's age, you could not consider both punishments?"

"I'm not saying that you shouldn't be able to consider a person's age. What I'm saying is wold that totally exclude for you any possibility of considering a sentence of death."

Simmons claims that these questions and statements about his age and their affect on a venirepersons' ability to sit in judgment over him in both the guilt and penalty phases violate the Eighth Amendment to the United States Constitution. Simmons claims that such questioning suggested that age was not a proper mitigating factor and could not be used as a basis for deciding against imposing the death penalty. Simmons further argues that the prosecutor sought a commitment from the jurors to impose the death penalty. Review is for abuse of discretion.

In *State v. Richardson* 923 S.W.2d 301 (Mo. banc 1996), the trial court dismissed potential jurors because they would not consider the death penalty on account of the defendant's age. Richardson claimed that these dismissals were improper because age is a legitimate statutory mitigating factor. This Court upheld the dismissals, noting the difference between the consideration of mitigating circumstances, which jurors must do, and a flat refusal to consider the full range of

punishment, which is grounds for disqualification. *Id.* at 309. Simmons contends that his case is distinguishable because the state led the jurors to believe that they should not consider age at all.

The state's questions and statements explore the issue whether the venirepersons would be able to perform their duties as jurors - whether they would be able to sit in judgment during the guilt phase and whether they would be able to consider the full range of punishment during the penalty phase because of the defendant's age. It remains the law that both the defendant and the state are entitled to a fair jury. Contrary to Simmons's argument, the state's voir dire questions and statements do not suggest that the defendant's age cannot be considered; in fact, the prosecutor expressly rejected that position. Instead, the state's inquires asked whether a potential juror would place too much weight on defendant's age when considering the facts and, ultimately, the appropriate punishment. Nor do the statements seek a commitment to vote for the death penalty.

Richardson controls. The trial court did not abuse its discretion in allowing the questions. The point is denied.

IV.

Confession

Simmons contends that he confessed involuntarily and that he should have a new trial. He claims this despite his receipt of *Miranda* warnings and his waiver of the rights the warnings protect. He maintains his Fifth Amendment rights were violated because he was subjected to interrogation despite his announcement of his intent to remain silent; he also asserts that he was coerced into confessing by intimidation and promises of leniency.

The *Miranda* warnings are "prophylactic." *Duckworth v. Eagan*, 492 U.S. 195, 203, 109 S.Ct. 2875, 2880, 106 L.Ed.2d 166 (1989). They are a judicial creation designed to "assure that the individual's right to choose between silence and speech remains unfettered throughout the interrogation process," *Miranda*, 384 U.S. at 469, 86 S.Ct. at 1625, despite an "interrogation environment [that] is created for no purpose other than to subjugate the individual to the will of his examiner." *Id.* at 457, 86 S.Ct. at 1619.

The test for whether a confession is voluntary is whether the totality of the circumstances created a physical or psychological coercion sufficient to deprive the defendant of a free choice to admit, deny or refuse to answer the examiner's questions. *State v. Lytle*, 715 S.W.2d 910, 915 (Mo. banc 1986). On appeal, the evidence pertaining to the admissibility of appellant's confession is reviewed in the light most favorable to the trial court's ruling. *State v. Debler*, 856 S.W.2d 641, 650 (Mo. banc 1993). Any conflicts in the evidence are for the trial court to resolve, and this Court will defer to the trial court's superior position from which to assess credibility. *Lytle*, 715 S.W.2d at 915.

According to the evidence adduced at the preliminary hearings and at trial, police arrested Simmons at his high school and drove him to the Fenton police headquarters. No questioning occurred at the time of the arrest nor during the journey to police headquarters. Upon arrival, Detectives Knoll, Elia, and Milano took Simmons into an interrogation room. Using a department form, Knoll read Simmons the warnings *Miranda* requires. Simmons initialed the rights on the form, indicating that he understood those rights. Simmons then signed a waiver of the rights the *Miranda* warnings are designed to protect, and the detectives commenced the interrogation. This initial interrogation was not electronically recorded.

The initial interrogation session lasted approximately two hours. At first, Simmons denied any knowledge of the crime. The detectives occasionally raised their voices and moved within close proximity (a foot) of Simmons's face. Knoll told Simmons that he thought Simmons was lying. The detectives also suggested that Simmons's accomplice, Charles Benjamin, had been arrested and was possibly confessing at that moment.

At some point during the interrogation, Lt. Edward Robertson, head of the major case squad, entered the room. He told Simmons that he was facing either the death penalty or life in prison and that is would be in his "best interest" to tell the truth. After Robertson left, Knoll and the other detectives encouraged Simmons to remember what Robertson had said and that it would be better for him to tell the truth.

Eventually, Simmons asked everyone but Detective Knoll to leave the room. Simmons confessed. Simmons then agreed to permit videotaping of his confession. Prior to his videotaped confession, Simmons again received the *Miranda* warnings and again Simmons waived his constitutional rights.

A.

Simmons acknowledges that the officers read him the *Miranda* warnings at least twice, and that each time, he indicated that he understood those rights and waived them. The fact that a defendant is repeatedly read the *Miranda* warnings, and voluntarily waives his rights, weighs in favor of a finding that the defendant voluntarily confessed. *State v. Lytle*, 715 S.W.2d 910 (Mo. 1986). Simmons, however, contends that the detectives conducting the investigation violated these rights by continuing to question him after he had indicated his intent to exercise his right to remain silent.

After receipt of the *Miranda* warnings, "if the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease." *Miranda*, 384 U.S. at 473-474, 86 S.Ct. at 1627. A person has a right under the Fifth Amendment to "cut off questioning" and this right must be scrupulously honored. *Michigan v. Mosley*, 423 U.S. 96, 103, 96 S.Ct. 321, 326, 46 L.Ed.2d 383 91975). The suspect, however, must give "a clear, consistent expression of a desire to remain silent" in order to invoke his rights adequately and cut off questioning. *United States v. Thompson*, 866 F.2d 268, 272 (8th Cir. 1989).

Nowhere in the record is there any direct testimony - from Simmons or anyone else - as to anything Simmons said or did that would constitute a "clear, consistent expression of a desire" to assert his Fifth Amendment rights and remain silent. The bulk of the evidence in the record pertinent to this issue consists of Simmons stating that he understood his rights, that he waived those rights, and that he confessed freely and voluntarily. Because Simmons received and understood the *Miranda* warnings, he also knew and understood that he had the right to stop the interrogation at any time. The record shows without equivocation that among the rights that Simmons initialed and indicated he understood was the following:

> If you decide to answer questions now without a lawyer present, you will still have the right to stop answering at any time. You also have the right to stop answering at any time until you talk to a lawyer.

Simmons, although aware of this right, never exercised it. At trial, defense counsel asked Detective Knoll the following questions during cross-examination:

Q. You advised Chris of his rights?

A. Yes, sir, I did.
Q. And you told him that he didn't have to talk to you?
A. Yes, I did.
Q. Did he have any problems - did he say, "I don't want to talk to you?"
A. No.
Q. Did he freely sign those forms?
A. Yes, he did.
Q. And he freely started to talk to you?
A. Yes, he did.
Q. And what did he tell you at first?
A. He said he didn't have any involvement in the crime.
Q. Well, did he terminate the interview at that point in time?
A. No, he did not.

The only evidence Simmons cites in support of his claim is a statement that Detective Knoll made at the beginning of Simmons's videotaped confession. The statement upon which Simmons relies follows an exchange in which Detective Knoll shows Simmons the advice-of-rights form and confirms that the form had been read to him; that Simmons understood it; and that Simmons had initialed and signed the *Miranda* waiver. Detective Knoll then observed that the investigation had been going on for some two hours and said: "During the time all of this [the interrogation] has been going on, you first started off saying you didn't know nothing about this crime, and you didn't want to tell us anything. Is that correct?"

This single, isolated statement hardly establishes that Simmons made a clear, consistent expression of a desire to remain silent. Read in context, Detective Knoll's statement refers to Simmons's initial denial of involvement in the crime, not any assertion of the Fifth Amendment right to remain silent. Furthermore, at trial, when directly asked by the defense whether Simmons ever sought to terminate the questioning,

Defective Knoll denied that Simmons had. Viewing the record as a whole, we find no substantial, credible evidence that Simmons ever asserted his right to terminate the questioning and remain silent.

B.

Simmons also claims that Detective Knoll threatened to use Simmons's silence against him, in violation of his Fifth Amendment rights. Detective Knoll allegedly told Simmons that if he did not tell the truth and confess, Knoll would testify about Simmons denying any involvement in the crime.

As evidence supporting his claim, Simmons points to the following from the deposition of Detective Knoll:

> Question: Did you discuss with [Simmons] in what ways his failure to give a statement could hurt him?
>
> Answer: Well, we just told him that if he chose to lie, which I believed he was, not to tell the truth, that if it went to court then I would get on the stand and I would testify that he sat there during the whole interrogation, and denied his involvement in the case.

This colloquy does not show an intent by Detective Knoll to use Simmons's *silence* against him. Rather, Knoll said that he would use Simmons's *statements* against him - his denials of involvement in the crime. A denial of involvement in the crime is not an invocation of one's right to remain silent. *State v. Pollock*, 603 S.W.2d 614, 620 (Mo. App. 1980); *State v. Burley*, 523 S.W.2d 575, 578 (Mo.App. 1975).

In telling Simmons that he would testify that Simmons

denied involvement in the case, Knoll also indirectly reminded Simmons that anything Simmons said could be used against him in court. Knoll did not mislead Simmons as to the scope of the rights, *Miranda* protects, nor did Knoll's statements infringe Simmons's right to remain silent.

C.

Simmons also contends that he confessed in exchange for a promise of leniency. Simmons claims that the detectives made an implied promise of leniency when they told him that he could possibly face the death penalty and that it would be better for him if he told the truth.

A confession resulting from a direct or indirect promise of leniency is inadmissible. *State v. Chandler*, 605 S.W.2d 100, 116 (Mo. banc 1980). However, officers' statements to a suspect that cooperating is in his or her best interests are not improperly coercive and do not, as a matter of law, render a confession involuntary. *Bannister v. Armontrout*, 4 F.3d 1434, 1440 (8th Cir. 1993); *State v. Klueg*, 781 S.W.2d 133, 136 (Mo.App. 1989); *State v. Wilson*, 755 S.W.2d 707, 709 (Mo.App. 1988); *State v. Dixon*, 655 S.W.2d 547, 556 (Mo.App. 1983). *See also U.S. v. Ruggles*, 70 F.3d 262, 265 (2nd Cir. 1995); *United States v. Ballard*, 586 F.2d 1060, 1063 (5th Cir. 1978) (finding that encouraging a suspect to tell the truth does not, as a matter of law, render the confession involuntary, even where the suspect is only sixteen years old).

There is no indication on this record that the detectives made any promise whatsoever to Simmons. They simply told him that is was in his best interest to tell the truth. Simmons tries to create an implied promise by linking the statements that it would be in his best interest to tell the truth to Robertson's statement that he was possibly facing the death penalty. We find this supposed nexus far too tenuous to support Simmons's

contentions. "If defendant had a hope of leniency, that hope 'springs from the seeds of his own planting [and] is not sufficient to render the resulting confession inadmissible.'" *State v. Schnick*, 819 S.W.2d 330, 336 (Mo. banc 1991).

D.

Simmons also contends that under the totality of the circumstances, his confession must be found involuntary. In determining whether a confession resulted from improper mental coercion, the court considers factors such as age, experience, intelligence, gender, lack of education, infirmity, and unusual susceptibility to coercion, but no one fact is dispositive. *State v. Lytle*, 715 S.W.2d at 915. Simmons reminds the Court that he was 17 years old at the time of the interrogation, a not-too-successful high school student, possessed of a low intelligence quotient and likely did not understand his constitutional rights, despite his assurances to the contrary at the time of the interrogation.

The record shows that authorities interrogated him for nearly two hours. Simmons claims the detectives used impermissibly coercive tactics to wrench a confession from him. Among those coercive tactics were yelling, "getting in his face," and misleading him about whether his accomplice Charlie Benjamin was making a statement implicating him.[1] The totality of these circumstances rendered Simmons's *Miranda* waiver involuntary, he now contends.

Viewing the evidence in the light most favorable to the trial court's decision, we do not find, under the totality of the circumstances, that Simmons was deprived of a free choice to

[1]Simmons also incorporates his prior arguments as evidence of improper police coercion, but we have already found above that the police did not engage in improper activity.

admit, deny or refuse to answer the detectives' charges, nor that he was subjected to such psychological coercion that his will was overborne at the time he confessed. The questioning was not unduly long; it lasted approximately two hours. Although the detectives "got in his face," no detective ever touched Simmons nor was he ever threatened with any physical harm. The detectives made neither promises nor threats. Although Simmons was told he could face the death penalty, such a statement does not constitute a threat but is a permissible observation of the possible consequences of first degree murder. *See, e.g., United States v. Scurlock*, 52 F.3d 531 (5th Cir. 1995) (finding that a truthful, non-coercive statement of the possible penalties an accused faces does not overbear the accused's free will). As for suggesting that his accomplice, Charlie Benjamin, was contemporaneously giving a statement implicating him, this tactic does not, *per se*, render Simmons's confession involuntary. Confessions obtained by falsely leading an accused to believe an accomplice has made statements implicating the accused are admissible. *State v. Flowers*, 592 S.W.2d 167, 169 (Mo. 1979).

We find no error in the trial court's decision to admit Simmons's confession. The points are denied.

V.
Detective Knoll's Testimony

Simmons claims the trial court denied his rights to due process and a fair trial because the trial court allowed Detective Knoll to offer his opinion as to Simmons's truthfulness and to testify as to whether Simmons expressed any remorse for the crime.

A.

On redirect, the prosecutor asked Detective Knoll

whether he believed that the final version of the story that Chris Simmons gave him was "the absolute truth." Simmons's counsel objected to the question on the grounds that the question would invade the province of the jury to determine Simmons's veracity. The prosecutor argued that he was trying to rebut the defense's cross-examination, which sought to establish that Knoll never actually knew what "the absolute truth" was, but rather considered anything Simmons told him to be "the absolute truth" as long as those statements implicated Simmons in the crime. The trial court sustained the objection. The prosecutor rephrased the question, asking:

> Q. Detective, after your investigation of this case, and knowing all the things you now know, do you believe that Chris Simmons told you everything about what he did?

The trial court overruled the defense's objection to the new question, and Detective Knoll responded, "No, I do not."

Despite Simmons's claim to the contrary, the second question and Knoll's answer are not improper comments by Knoll on Simmons's veracity. Knoll's statement focuses on whether he believed there was more Simmons could have said in his confession.

In any event, there is no prejudice. There is ample evidence to support Simmons's conviction. Simmons's own words are sufficiently damning to make Knoll's statements inconsequential.

Moreover, it would make little sense for Knoll to question Simmons's credibility when Simmons's own confession is the strong, nearly impregnable foundation of the state's case. The point is denied.

B.

Simmons also takes issue with Detective Knoll's testimony on redirect that Simmons never said he was sorry. Simmons contends this testimony was irrelevant and immaterial to the issue of guilt, and the trial court abused its discretion in allowing the testimony.

On cross-examination, the defense established through Detective Knoll that Simmons cried on several occasions during his confession. On redirect examination, the prosecutor asked:

> Q. Detective Knoll, I'll ask you again, defense counsel asked you if the Defendant was crying. At any time, did he ever say he was sorry?
>
> A. No, he did not.

In response to an objection, the prosecutor claimed that he addressed the question of Simmons's remorse, or lack thereof, to rebut the possible inference of remorse the jury might have made from the fact that Simmons was crying. The determination of the scope of rebuttal is within the trial court's discretion and, absent an abuse of such discretion, the trial court's decision will not be reversed. *State v. Hamilton*, 892 S.W.2d 371, 379 (Mo.App. 1995).

While it is not clear that the defense raised the issue of remorse by injecting evidence of the defendant's lacrimation, we cannot say that the admission of Knoll's testimony of rebuttal - absent any showing of prejudice and in light of the overwhelming evidence supporting the conviction - rose to the level of an abuse of discretion that requires reversal. The point is denied.

VI.

"Voodoo Man" Testimony

Simmons claims that the trial court erred during the guilt phase in allowing two witnesses to testify regarding Simmons's plans and preparations to steal from and murder a neighborhood resident known as the "voodoo man." This testimony, according to Simmons, constituted evidence of prior bad acts, was not offered for any of the recognized exceptions to the evidentiary rule that excludes evidence of other crimes, and was both irrelevant and highly prejudicial.

A.

The first mention of the "voodoo man" at trial came from Christie Brooks, who testified that Simmons came by her house about five hours prior to the break-in at Shirley Crook's residence and told her that he and two others were going to rob the "voodoo man." Defense counsel did not object to Christie Brooks's testimony and, on appeal, Simmons requests plain error review.

In *State v. Brown*, 912 S.W.2d 278, 284 (Mo. banc 1995), we said:

> [U]nless a claim of plain error facially establishes substantial grounds for believing that "manifest injustice or miscarriage of justice has resulted," this Court will decline to exercise its discretion to review for plain error under Rule 20.20. We will, however, consider related claims of ineffective assistance of counsel for failure to preserve the alleged trial error under the test of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

Simmons's point does not raise a substantial ground for

finding plain error on its face.

B.

Additional and more detailed testimony regarding the plot to rob the voodoo man arose later in the trial when John Tessmer testified. Defense counsel had filed a motion in limine regarding Tessmer's testimony about the voodoo man, which the trial court overruled. Defense counsel offered a continuing objection to the testimony at trial, which was also overruled.

Tessmer testified that Simmons talked about a plan to murder someone because he wanted "a bunch of money." Simmons told Tessmer he would throw the victim off a bridge and had the "voodoo man" in mind. Simmons discussed the plan with Tessmer three to five times during the early part of September. The voodoo man was always the intended victim whenever Simmons discussed his plan with Tessmer. Simmons also discussed the plan with Tessmer and Charlie Benjamin while at Brian Moomey's house, saying that he wanted to kill someone and "get a bunch of money" by tying them up and throwing them off a bridge or by tying the victim to a tree and getting the victim's bank card.

Tessmer also testified that he observed Simmons making masks out of sweatshirts so the voodoo man would not see their faces. About four days prior to Shirley Crook's murder, Simmons allegedly asked Charlie Benjamin to help them kill somebody, according to Tessmer. Tessmer said that about three days before the murder, he saw ropes and gloves at Simmons's house.

On September 8, Simmons told Tessmer that he wanted to meet him and Charlie Benjamin at Brian Moomey's house at 2:00 a.m. the following morning for the purpose of committing the murder. Tessmer met Simmons at Brian Moomey's house

but did not go with him to Shirley Crook's house. Tessmer did not believe that Simmons was actually intending to rob and murder someone that night. Tessmer also testified that Simmons did not have any weapons, masks, or other equipment with him that night.

The trial court has broad discretion to exclude or admit evidence at trial. This Court will reverse only upon a showing of a clear abuse of discretion. *State v. Parkhurst*, 845 S.W.2d 31 (Mo. banc 1992). A trial court's admission of irrelevant and immaterial evidence, even of other crimes, will not be reversed on appeal absent a showing of prejudice. *State v. Ellis*, 853 S.W.2d 440, 445 (Mo. App. 1993). Tessmer's testimony is not other crimes testimony. It speaks directly to Simmons's motive and the deliberateness of his general plan to steal and murder. On that basis it is admissible. Nevertheless, and assuming for the sake of argument only that Tessmer's testimony should have been excluded, we do not find that is inclusion prejudiced Simmons in light of the other, overwhelming evidence of Simmons's guilt.

This case is not at all like *State v. Sladek*, 835 S.W.2d 308 (Mo. banc 1992), on which Simmons relies. In *Sladek*, it was ***explicitly*** clear that the trier of fact (in that case, the court), relied on the uncharged transgressions to convict Sladek. When sentencing Sladek, the trial court said that the state had a very weak case, that absent the evidence of *Sladek's* uncharged transgressions the trial court would not have found Sladek guilty, and that if the evidence of the uncharged transgressions should not have come in, then Sladek's conviction should be reversed on appeal. *Id.* at 310-11.

In sum, Simmons has made no showing of prejudice that flowed from the testimony of John Tessmer. We find no abuse of discretion on the part of the trial court in overruling the defense's motion in limine and continuing objections at trial

regarding John Tessmer's testimony.

VII.

Improper Closing Argument During Guilt Phase

Simmons assigns error to the trial court's failure to correct the prosecutor's closing argument during the guilt phase. Of the errors claimed, only one was properly preserved for review.

During the guilt phase of the trial, the prosecutor argued:

> The evidence is uncontroverted. Uncontroverted. The evidence of plotting, the evidence of burglary, the evidence of premeditation, the evidence of binding, the evidence of blindfolding, transporting, of murder. I'm going to ask you to go back, and render a verdict of guilty of murder in the first degree. You're never going to get to the other verdict because there was premeditation. This wasn't sudden passion. This wasn't an accident. Premeditation, binding and transporting. Render that verdict ***so we can get on with the rest of the trial***.

Defense counsel objected to the highlighted portion of the argument. The trial court overruled the objection. Simmons claims that the argument improperly refers to the punishment phase of the trial without giving the defense an opportunity to address the argument. Simmons relies on *State v. Maxie*, 513 S.W.2d 338, 345 (Mo. 1974), for the proposition that if punishment is discussed in closing arguments, the discussion should occur in the opening portion of the state's argument so that defense counsel has an opportunity to respond

to that argument. Simmons also contends that the prosecutor's statement is contrary to the instructions of the court because the prosecutor argued that the jury should hurry in its deliberations.

The trial court's ruling will not be overturned absent an abuse of discretion resulting in prejudice to the defendant. *State v. Mahurin*, 799 S.W.2d 840 (Mo. banc 1990). An abuse of discretion exists only where the prosecutor's statements are plainly unwarranted and clearly injurious to the defendant. *Id.*

Reading the prosecutor's statements context, we do not believe that the prosecutor is urging the jury to hurry its deliberations or inviting the jury to consider punishment prematurely. At most, the prosecutor's argument is inartful attempt to summarize the overwhelming and undeniable evidence of guilt. The point is denied.

VIII.

Media Coverage

Simmons contends he was denied due process, a fair trial, and his right to confront witnesses because the trial court allowed cameras in the courtroom to cover the proceedings over Simmons's objection. Simmons claims he was prejudiced because the presence of the cameras may have affected the testimony of the State's witnesses, particularly Shane Knoll and Brian Mooney.

Electronic media coverage of criminal trials does not constitute a *per se* denial of due process. *Chandler v. Florida*, 449 U.S. 560, 574, 101 S.Ct. 802, 809-10, 66 L.Ed.2d 740 (1981). The defendant must produce evidence that the media coverage of his case "had an adverse impact on the trial participants sufficient to constitute a denial of due process." *Id.* at 581, 101 S.Ct. at 813. Simmons has not produced such

evidence nor does his argument offer more than hopeful speculation. The point is denied.

IX.

Disclosure of Witness Arrest Records

Simmons contends he was deprived of a fair trial because the trial court refused to order the disclosure of the arrest records of all of the state's witnesses. As a result, Simmons claims, he could not effectively cross-examine the state's witnesses regarding their biases, prejudices, or motives to lie on the stand.

Rule 25.03 designates certain types of information that the state must disclose to the defendant. If the information sought by the defendant does not fall within any of these categories, the defendant may make a written motion to the court requesting the state to disclose the information under the terms of Rule 25.04. If the court finds the request reasonable, the court will order the state to disclose the information to the extent the court finds it relevant and material to the defendant's case.

In reviewing claims regarding meaningful discovery in a criminal trial, this Court looks to see whether there was a reasonable likelihood that the denial affected the result of the trial. The trial court's refusal to require disclosure will be overturned only if it appears that the trial court abused its discretion to the extent that fundamental unfairness to the defendant resulted. *State v. Mease*, 842 S.W.2d 98, 108 (Mo. banc 1992).

In this case, Simmons requested that the trial court order the state to disclose the prior criminal history or "rape sheets" of all state witnesses. Simmons admits that the trial court

sustained Simmons's motion as to prior convictions,[2] but claims that the court refused to order the state to disclose the "rap sheets" or similar information regarding prior arrests that did not lead to convictions.[3] Simmons sought this information in order to impeach the witnesses' credibility. While generally, one may not impeach a witness's credibility by showing an arrest, investigation or criminal charge that has not resulted in a conviction, a party can use such evidence if the inquiry would demonstrate either (1) a specific interest of the witness; (2) the witnesses's motivation to testify favorably for the state; or (3) that the witness testified with an expectation of leniency. *State v. Wise*, 879 S.W.2d 494 (Mo. banc 1994).[4] Even for such purposes, a witness's arrest record would only be relevant to the extent there are any *pending* charges; past arrests, investigations, or charges would not be relevant to show *present* motivation to testify favorably for the state. *See, e.g., State v.*

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[2]We note that a court order is not necessary to obtain prior convictions as these are required to be disclosed under Rule 25.03(A)(7).

[3]It is not clear what the trial court ordered disclosed in this regard. The trial court initially indicated that it would sustain Simmons's motion. The parties then discussed whether arrest records are discoverable or only prior convictions. The court then told the State "to summarize prior criminal history, but not to provide the original rape sheet." Mr. Crosby, for the defense, argued that the entire rap sheets were discoverable, although not necessarily admissible. The Court responded, "I'll stand on that for now" and called a recess. Upon return, the Court stated that it "had sustained [the motion for disclosure by Court order] as to the prior criminal history." The scope of "criminal history" is never defined.

[4]The state argues that Simmons was not entitled to disclosure because he failed to show that any of the above exceptions apply. This argument puts the cart before the horse. The exceptions address whether such information is admissible, not whether it is discoverable. The entire purpose of discovery of arrest records is to determine whether the witness had a motivation to testify favorably for the state or had an expectation of leniency. Admissibility issues arise only after the defense offers evidence that it found through discovery.

Joiner, 823 S.W.2d 50, 53 (Mo. App. 1991) (distinguishing between the potential relevancy of pending charges and the irrelevancy of past charges).

For the purpose of impeachment, it appears that Brian Moomey is the only witness whose arrest records could have possibly been material or relevant to Simmons's case, assuming, of course, that those records would have revealed any pending charges. The trial court's apparent decision not to require disclosure of Moomey's arrest records is not an abuse of discretion, however, because there is simply no grounds for believing that the non-disclosure had any palpable effect on the outcome of the trial. Simmons confessed to the murder, and thus there was ample evidence of his guilt. As for impeaching Moomey's testimony, the defense established that Moomey had spent time in prison for assault with a weapon, burglary and stealing; that he drank heavily - indeed, admitted passing out almost every night, and that he had told the witness coordinator that he was afraid to testify because "people were investigating [him] for the murder, and the investigator was focusing on [him] as being involved in the death of Shirley Crook." Evidence of other of Moomey's illegal activities could hardly have had a negative impact on the jury's view of his character given what they already knew. Moreover, the record reflects ample opportunity to cross-examine the witnesses, and there is no evidence indicating that a "fundamental unfairness" resulted from the trial court's decision not to require disclosure of Moomey's entire rape sheet. The point is denied.

X.

Reasonable Doubt Instructions

Despite nearly ten years of case law contrary to his position, Simmons doggedly raises the consistently-raised-but-to-date futile chalienge to the validity of instructions based on

MAI-302.04 and 313.30, claiming that the "firmly convinced" language in the instructions lowers the state's burden of proof, thereby depriving Simmons of due process. This Court has upheld the "firmly convinced" language in *State v. Chambers*, 891 S.W.2d 93 (Mo. banc 1994); *State v. Parker*, 886 S.W.2d 908 (Mo. banc 1994); *State v. Williams*, 871 S.W.2d 450 (Mo. banc 1994); *State v. Harris*, 870 S.W.2d 798, 811 (Mo. banc 1994); *State v. Shurn*, 866 S.W.2d 447, 462 (Mo. banc 1993); *State v. Ramsey*, 864 S.W.2d 320 (Mo. banc 1993); *State v. Griffin*, 848 S.W.2d 464, 469 (Mo. banc 1993); *State v. Ervin*, 835 S.W.2d 905, 924 (Mo. banc 1992); *State v. Blankenship*, 830 S.W.2d 1, 13 (Mo. banc 1992); *State v. Twenter*, 818 S.W.2d 623, 634 (Mo. banc 1991); *State v. Waller*, 816 S.W.2d 212 (Mo. banc 1991); *State v. Wacaser*, 794 S.W.2d 190, 195 (Mo. banc 1990); *State v. Murray*, 744 S.W.2d 762, 771 (Mo. banc 1988); *State v. Antwine*, 743 S.W.2d 51, 63 (Mo. banc 1987); *State v. Bowman*, 741 S.W.2d 10, 15 (Mo. banc 1987); *State v. Sandles*, 740 S.W.2d 169, 175 (Mo. banc 1987); and *State v. Guinan*, 732 S.W.2d 174, 178 (Mo. banc 1987). The point is denied.

XI.

Simmons alleges that the trial court erred in overruling his motion to strike the "depravity of mind" aggravating circumstance and in overruling his objection to Instruction 16, which submitted that aggravating circumstance to the jury. Simmons contends that the depravity of mind aggravating circumstance is unconstitutionally vague and that he is entitled to a new sentencing hearing because of its allegedly erroneous use.

The depravity of mind aggravator was submitted to the jury as follows:

> 4. Whether the murder of Shirley Crook involved depravity of mind and whether, as a result thereof, the murder was outrageously and wantonly vile, horrible, and inhuman. You can make a determination of depravity of mind only if you find:
>
> That the defendant killed Shirley Crook after she was bound by defendant and that defendant thereby exhibited a callous disregard for the sanctity of all human life.

This language is similar, in all material respects, to the "depravity of mind" aggravator at issue in *State v. Tokar*, 918 S.W.2d 753, 772 (Mo. banc 1996).[5] In *Tokar*, this Court determined that "the jury was specifically provided guidance on when they could find this aggravating circumstance." This Court has held that language and limiting instructions such as that in this case and in *Tokar* provide sufficiently narrow parameters to guide the jury and that the instruction not constitutionally vague. *Id. State v. Mease*, 842 S.W.2d 98, 113 (Mo. banc 1992), *cert. denied*, 508 U.S. 918, 113 S.Ct. 2363, 124 L.Ed.2d 269 (1993); *Sidebottom v. State*, 781 S.W.2d 791, 799 (Mo. banc 1989), *cert. denied*, 497 U.S. 1032, 110 S.Ct. 3295, 111 L.Ed.2d 804 (1990). The point is denied.

XII.

Rule 29.15 Issues

Simmons's Rule 29.15 motion contains numerous claims of ineffective assistance of trial counsel. We have exercised our discretion not to permit plain error review where

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[5]The only difference is that the aggravator in *Tokar* read "Bound or otherwise rendered helpless."

counsel failed to preserve an alleged error for appellate review and the request for plain error review does not establish substantial grounds of prejudice on its face. Consistent with *State v. Brown*, we have reviewed each of the claims of ineffective assistance carefully and determined that those claims not individually addressed below offer no grounds upon which a reasonable probability of prejudice to Simmons from counsels' acts of failures to act could be founded. Because an individual analysis of these claims would carry no precedential value, they are denied without further discussion. Rule 84.16(b).

To prevail on a claim of ineffective assistance of counsel, the movant must establish by a preponderance of the evidence "that counsel failed to exercise the customary skill and diligence that a reasonably competent attorney would perform under similar circumstances, and that he was prejudiced thereby." *Moore v. State*, 827 S.W.2d 213, 215 (Mo. banc 1992); *Strickland v. Washington*, 466 U.S. 668, 687-89, 104 S.Ct. 2052 2064-65, 80 L.Ed.2d 674 (1984). Prejudice exists where there is a reasonable probability that the outcome of the proceeding would have been different but for counsel's ineffectiveness. *Strickland,* 466 U.S. at 694, 104 S.Ct. at 2068. Where trial counsel decides as a matter of trial strategy to pursue one evidentiary course to the exclusion of another, trial counsel's informed, strategic decisions not to offer certain evidence is not ineffective assistance. *Leisure v. State*, 828 S.W.2d 872, 875 (Mo. banc 1992). A motion court's determination will be overturned on appeal only if it is clearly erroneous. *State v. Whitfield*, 939 S.W.2d 361, 369 (Mo. banc 1997).

A.

Simmons claims that trial counsel was ineffective in failing to object during guilt phase closing argument when the

state said

> Well, in that struggle [with Shirley Crook], [Simmons] won, but in this struggle he's not going to win because this struggle goes beyond what happened on September 9th of 1993. This struggle goes to what goes on every day in society. We have to take a stand and take control of our streets. [They're our] streets, [they're our] homes. If we can't be protected in our homes, we can't be protected anywhere. ***Do you think he wants you protected in your home?***

(Emphasis added.)

Simmons argues that the highlighted portion of the argument constitutes an improper personalization of the crime to the jury. It is, of course, improper for a prosecutor to suggest personal danger to the jurors or their families if the defendant should be acquitted. *State v. Storey*, 901 S.W.2d 886, 901 (Mo. banc 1995); *State v. Santonelli*, 914 S.W.2d 13, 15 (Mo. App. 1995).

The prosecutor's statement is a vague and ill-defined, near-non sequitur. It does not suggest personal harm to the jurors if Simmons is acquitted. In *Storey*, the state asked the jurors to put themselves in the victim's shoes and imagine the crime happening to them. *Storey*, 901 S.W.2d at 901. The prosecutor's statement here is substantially less personal than the argument condemned in *Storey*. Moreover, Simmons makes no showing or reasonable argument that the statement had a decisive effect on the outcome of the trial, given the evidence of Simmons's guilt.

Simons also maintains that the entire argument as set

out above was an argument outside the record to which his counsel should have objected. Simmons does not explain this claim sufficiently well for us to grasp its focus. Nevertheless, assuming that Simmons's argument is that the statement alleges that society's struggle with crime goes on every day, we have previously said that the prosecutor may argue the prevalence of crime in the community and may call on common experience in doing so. *State v. Clemmons*, 753 S.W.2d 901 (Mo. banc 1988).

Simmons goes to assert that the argument is impermissible because prosecutors may not urge a conviction in order to protect community values or deter future lawbreaking. Simmons is incorrect. The state may argue that the jury should send a message that society will not tolerate certain conduct. *State v. Cobb*, 875 S.W.2d 533, 537 (Mo. banc 1994).

B.

Simmons also claims trial counsel was ineffective in failing to object to the prosecutor's guilt-phase argument that "[n]o matter how obviously guilty, he has a right to a fair trial. Folks, he had his day in court. The Judge has taken every precaution." Simmons argues that the statement is an improper comment about the prosecutor's opinion of Simmons's guilt, and that such a statement plays on the jury's susceptibility to believe the prosecutor, suggests the prosecution's possession of undisclosed matters relating to the crime, and undermines the jury's discretion.

The prosecutor may make statements that draw a legitimate inference from the evidence but may not make statements that imply a knowledge of facts not before the jury. *State v. Whitfield*, 837 S.W.2d 503 (Mo.1992). The statement "no matter how obviously guilty" merely suggests that the

evidence adduced at trial supports a finding of guilt; the statement does not suggest knowledge of outside facts, but highlights Simmons's own confession.

Simmons claims ineffective assistance of counsel resulted when the prosecutor referred to him as a "predator" and suggested he possessed an "evil mind" and trial counsel did not object. It is not error for a prosecutor to characterize a defendant and his criminal conduct as long as the evidence supports such a characterization. For example, in *State v. Carson*, 883 S.W.2d 534 (Mo.App.1994), the court did not fault the defense for failing to object to the prosecutor's characterization of the defendant as a "thug and bully." The court observed that the evidence showed that the victim was "jerked back real quick," hit in the back and shoved to the ground. This conduct, the court found, was "the work of a thug and bully." *Id.* at 536.

In this case, a reasonable person could find the deliberate, premeditated murder of Shirley Crook by throwing her from a bridge the work of a predatory person with evil motives. This is simply not a case where the prosecutor ascribed labels to the defendant that were totally unsupported by the evidence, as in *State v. Whitfield*, 837 S.W.2d 503 (Mo.1992) (finding insufficient evidence to label homicide defendant as a "mass murderer" and a "serial killer"), or where the prosecutor injected evidence of unrelated crimes, as in *State v. Burnfin*, 771 S.W.2d 908 (Mo.App.1989). The motion court did not err in overruling Simmons's Rule 29.15 motion on these points relating to guilt phase closing argument.

C.

Simmons claims that his trial counsel was ineffective in failing to investigate and present evidence during the penalty phase relating to abuse Simmons suffered as a child, his alcohol and drug abuse, his mental illness, and threats made by Brian

Moomey to Simmons and his family following Simmons's arrest.

At the crux of Simmons's claim of ineffective assistance of trial counsel is the role of Dr. Daniel Cuneo. The Rule 29.15 hearing record shows that Simmons's counsel employed Dr. Cuneo to complete an evaluation as to Simmons's competency, sanity, and to determine the presence of mitigating factors for use in the penalty phase. Simmons claims that his attorneys' decision not to present evidence of Simmons's physical abuse at the hands of his stepfather, psychological abuse resulting from his bitterly divorced parents, and his own abuse of alcohol and drugs was not an informed decision. Simmons characterizes his attorneys' actions as a failure to investigate and concludes that a strategic decision that is not informed is not a strategic decision at all. Much of Simmons's claim in this regard results from his belief that there was serious miscommunication between his attorneys and Dr. Cuneo. He claims that Dr. Cuneo assumed that the attorneys would provide him all of the relevant evidence necessary to formulate an opinion as to the presence of psychologically-based mitigating circumstances. He also claims that the attorneys assumed that Dr. Cuneo would conduct an independent investigation and would not rely solely on information provided by Simmons's attorneys.

It appears from our review of the record that the attorneys initially believed that absent compelling psychological evidence that might explain Simmons's homicidal behavior, Simmons stood a better chance with the jury if the penalty phase evidence attempted to play on the jury's sympathy and the impact on Simmons's family should he be put the death at the hands of the state. Dr. Cuneo's work--at least as it regarded mitigating circumstances--was designed to determine whether such compelling psychological evidence existed.

The motion court found Simmons's counsel thoroughly

investigated Simmons's background.

> Mr. Crosby [one of the two trial counsel] indicated that he interviewed many individuals in preparation for Movant's defense. He testified that he interviewed one of Movant's counselor's [sic] at school, the principal and the assistant principal of Movant's school, Movant's parents, Movant's grandparents, a cousin, step-brothers, the father of Beth Simmons, Robert Hayes' sister, Joe Tessmer, Christy Brooks and Chris Brown. He indicated that he reviewed the school records of Movant and learned that his grades were not good and that his absenteeism was high and that several times [sic] disciplinary actions was [sic] imposed upon Movant. Mr. Crosby also indicated that he on several occasions spoke with an attorney, Mr. John Counts, who represented Charles Benjamin, a co-defendant in the criminal case.
>
> Mr. Crosby indicated he learned of Movant's use of marijuana and alcohol. He testified that the Movant's involvement in his use of marijuana and alcohol were not considered by him to be significant enough to demonstrate any impact on Movant's state of mind....
>
> Mr. Crosby testified that while Movant was in custody he met with him fifteen to twenty times and averaged one hour per visit. Movant denied to Mr. Crosby that Robert Hayes [movant's stepfather] abused him....
>
> * * * * * *

> Mr. Burton [one of the two trial counsel] testified that he mailed sixty letters to the individuals named by Movant. He testified that he had interviewed Movant four or five times and he interviewed Movant's parents and several of his friends. He testified that he spoke with several of Movant's school teachers and with one former employer through that employer's attorney.

In addition, Dr. Cuneo testified at the Rule 29.15 hearing about his conversations with Simmons's attorneys.

> A. [by Dr. Cuneo, upon cross-examination by the State] They asked me what my perceptions were. One of the things is that they were worried that his history of alcohol and drug abuse may not be helpful. My perceptions of Christopher at that time was he had borderline traits and his accounting to me of the alleged offense, I had stated was quite cold and they felt that if I thought that some of the mitigating factors would be important, i.e., the fact of his possible relationship with Brian Moomey; the fact of calling them Thunder Cats, the fact of having a kiddy gang that very well may have been supporting him although we never had any hard data on that; also the perception that the way he accounted the crime to me, or his accounting of the alleged offense or crime to me was extremely cold and that would not be in his best benefit to have that done. So we talked n I guess we talked for about an hour and hour and a half [sic] on the phone as to whether in fact I should pursue anything else. And they stated no. I called back later

> before trial to see if we wanted to and it was their decision at that point that there were some things that were bad that I could say. The bad that I could say would outweigh what I could say that could be helpful.

The decision not to pursue the psychological evidence was founded on Dr. Cuneo's initial report that identified no compelling mitigating circumstance. The motion court found:

> Mr. Burton outlined his plan for the penalty phase of trial. He indicated that he wanted to counter what the State's evidence was and to appeal to the sympathies of the jury and ensure the jury knew Movant was only seventeen. He intended to present the Movant as one who was liked or loved by his brothers, his mother, his father and Christy Brooks. He also sought the perspective testimony of other friends, school teachers or former employers but learned that none of them could offer anything substantive. In fact, some appeared to be intimidated by the charge pending against Movant and were unwilling to discuss anything positive about him. The plan included the intention to present Movant as a seventeen year old individual who had not yet had the opportunity to develop a series of good deeds but to some extent did do good for one of his age. Another objective was to present some of Movant's family to demonstrate their sorrow in contemplating the possible recommendation of death. Mr. Burton believed that if the jury chose not to like Movant, they may choose to like his family and spare Movant's life for the family's benefit.

* * * * * * *

> Mr. Burton indicated that a decision was made to present no evidence regarding Movant's drug or alcohol use. He testified that he learned there was no alcohol consumed or drugs used at the time of the crime. Mr. Burton also learned of the strained relationship between Movant and his step-father. He indicated he believed that any information regarding this relationship would serve to work against Movant and therefore a decision was made not to present any of that evidence during the mitigation phase.

This strategic decision is made all the more reasonable when one considers--as did the motion court--the testimony offered by Dr. Robert Smith in support of Simmons's position at the Rule 29.15 hearing. After administering a battery of tests to Simmons and his parents and stepfather, and after extensive interviews with Simmons and with persons familiar with Simmons's upbringing, Dr. Smith determined that Simmons had a borderline personality disorder and a schizotypal personality disorder. Missouri juries considering the death penalty have often rejected such testimony as the sort of compelling, psychological mitigating evidence that warrants a life sentence. *See, e.g., State v. Kreutzer*, 928 S.W.2d 854 (Mo. banc 1996) (jury recommends death penalty despite psychological testimony that defendant suffered from post-traumatic stress disorder and borderline personality disorder as a result of past emotional and physical abuse); *State v. Parker*, 886 S.W.2d 908 (Mo. banc 1994) (jury recommended death sentence after mental health expert testified to defendant's borderline personality disorder); and *State v. Duisen*, 428 S.W.2d 169 (Mo. banc 1967) (jury recommended death sentence after hearing evidence that defendant had a schizophrenic reaction of the paranoid type and anti-social behavior). Simmons's

experienced trial counsel, no doubt aware of the likelihood of the success of the psychological evidence, chose a strategy they believed might give Simmons's better chance for a life sentence. That the strategy was not successful does not render its use ineffective assistance of counsel.

Simmons argues that *Eddings v. Oklahoma*, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982), requires the trial counsel to offer mitigating evidence of childhood abuse and severe emotional disturbance when the defendant is youthful. Despite Simmons's claim to the contrary, *Eddings* does not require that such evidence be placed before the jury during the penalty phase. In *Eddings*, the constitutional error was not the failure to put on mitigating evidence but the failure of the sentencing court to consider it. Where trial counsel makes a reasoned decision not to place such evidence before the jury during the penalty phase, *Eddings* does not announce a per se rule mandating the submission of mitigating evidence solely because of a defendant's youth.

The motion court did not clearly err in denying Simmons's claims of ineffective assistance of counsel on this point.

D.

During the penalty phase, Mrs. Crook's husband, Steven, testified:

> But she was terrifically scared of height. It terrifies me to think of her being blindfolded and knowing that she was--because I feel that they would have talked about where they were going, and to be thrown off of a high spot would be really a terrible thing for her to--and then how she would feel about not being home when

I come home. I know that as much pain as she would have been going through, I know she would have been worried about me, and worried about Kim and Randy and her mother. Her mother was ill.

Mrs. Crook's daughter, Kimberly Hawkins said:

Like I said, I have dreams. I dream about how she--how I imagine she felt during all of this, what she thought. I can't imagine what she went through, the terror that she felt. I just--I have a picture in my mind that she can't see, she can't speak, she can't scream out, she can't get her hands on anybody, she's tied up, she's naked. You know, she never wanted to be unclothed. It just tore her down emotionally. Threw her in a van. I just imagine--I can imagine her feelings--you know--I can imagine that--I'm sure they were talking.

I can imagine that she was being pushed over, and the freeness of the air. There's nothing below you, there's nothing holding you up. I can't imagine the terror that she's thinking, what's happening, what's going on, I can't see anything. Then I imagine her hitting the water. Does she know to take a breath? Does she know that's what was going to happen. Then you hit the water, and then you go in. And then if she had a breath that she held, how long could she hold it? Did it hurt? When the water came in, did it hurt?

Mrs. Crook's sister, Purdy Mitchell, read a prayer she had prepared and delivered at the family's first Thanksgiving

after Mrs. Crook's murder.

Dear God, we come together to remember, to celebrate and give thanks. You have given us the gift of each other, and the love we share that you have planted in our hearts. By your gracious hand, we have received all that we have for our love and our hope and faith. We are grateful. We humbly ask you to grant your special graces to our family. May our homes be a place of peace and love and faith. We ask you, Dear God, to protect and bless all of us absent and present, living and dead. We wanted to put something in there that would kind of say Shirley without saying her name. Please bless this food, and bless us who are gathered here. In the name of Jesus, Amen.

Simmons claims his counsel was ineffective in failing to object to this testimony of the victim's family and that this failure resulted in a violation of Simmons's Eighth and Fourteenth Amendment rights.

1.

Payne v. Tennessee, 501 U.S. 808, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991), reversed the holdings of *Booth v. Maryland*, 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987), and *South Carolina v. Gathers*, 490 U.S. 805, 109 S.Ct. 2207, 104 L.Ed.2d 876 (1989), that the Eighth Amendment forbids the admission of victim impact evidence during the penalty phase of a capital trial in every instance. *Payne* expressly limited its holding to victim impact evidence. Because the evidence in *Payne* did not extend to the victim's family's characterizations of and opinions about the crime, the Supreme Court did not reconsider *Booth's* holding that such

evidence likewise violates the Eighth Amendment. *Payne*, 501 U.S. at 830, n. 2, 111 S.Ct. at 2611, n. 2.

The Supreme Court's Eighth Amendment jurisprudence has not beaten an easily-followed path, as the transition from *Booth* to *Gathers* to *Payne* shows. Pre-*Booth* decisions focus the Eighth Amendment inquiry on concerns "that the sentencing process should facilitate the responsible and reliable exercise of sentencing discretion" by the jury. *Caldwell v. Mississippi*, 472 U.S. 320, 328-29, 105 S.Ct. 2633, 2639, 86 L.Ed.2d 231 (1985). *Payne*, authored for the Supreme Court by Chief Justice Rehnquist, seems to reject Eighth Amendment concerns about reliability expressed in *Caldwell*, at least as to matters of evidence introduced at the sentencing phase. *Payne* adopts the view of then-Justice Rehnquist's *Caldwell* dissent that "there is no [Eighth Amendment] requirement that all information received by a sentencing jury be 'relevant.' " *Id.* at 351, 105 S.Ct. at 2651 (Rehnquist, J., dissenting).

Thus, it appears that post-*Payne*-Eighth-Amendment analysis applies to those situations in which penalty phase procedures operate to diminish the jury's sense of responsibility for its decision to impose death, *Caldwell*, or where the sentencer's discretion is not "suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." *Zant v. Stephens*, 462 U.S. 862, 874, 103 S.Ct. 2733, 2741, 77 L.Ed.2d 235 (1983). After *Payne*, reliability concerns that attach to matters of evidence during the penalty phase are considered under a due process rubric. "In the event that evidence is introduced that is so unduly prejudicial that it renders that trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief." *Payne*, 501 U.S. at 825, 111 S.Ct. at 2608. Simmons's Eighth Amendment argument is denied.

2.

Simmons claims that counsels' alleged ineffectiveness resulted in a violation of his right to due process. The test of a due process violation, as the preceding paragraph notes, is whether the evidence is so prejudicial that it renders the trial fundamentally unfair.

The evidence in this case did not offend the due process clause. Though an Eighth Amendment case, *Payne* makes clear that "there is nothing unfair about allowing a jury to bear in mind that harm [the defendant's acts had caused] at the same time as it considers the mitigating evidence introduced by the defendant." *Id.* at 826, 111 S.Ct. at 2609.

It is an affront to the civilized members of the human race to say that at sentencing in a capital case, a parade of witnesses may praise the background, character and good deeds of Defendant ... without limitation as to relevancy, but nothing may be said that bears upon the character of, or the harm imposed, upon the victims.

Id., quoting State v. Payne, 791 S.W.2d 10, 19 (Tenn.1990). Moreover, Justice O'Connor's concurring opinion suggests that in light of "the jury's unavoidable familiarity with the facts [of the murder]," witness testimony at the sentencing phase describing the loss suffered by the victim's family does not violate due process where the statements of the witnesses do not inflame the passions of the jury beyond the passion that the facts of the crime itself inflames. *Payne*, 501 U.S. at 832, 111 S.Ct. at 2612 (O'Connor, J., concurring).

Steven Crook spoke about his wife's fear of heights and the terror that she must have felt. No one doubts that the jurors were moved by this testimony. But the jurors had already heard from Christopher Simmons himself about her abduction; the way she was bound; the manner in which she was thrown into the minivan; her struggle to free herself; Simmons's use of her

own clothing and personal items to hog tie her; his decision to use duct tape to cover her face, restrict her breathing, and blind her. The jury would have known that she knew she was on railroad tracks because she had freed herself earlier and realized that a trestle lay ahead. As human beings, the jurors would have imagined the scene and felt what Shirley Crook felt as she struggled and fought for breath and was thrown and fell to her death. We doubt that Steven Crook could inflame the jurors more than Christopher Simmons did in his confession of the murder.

Kimberly Hawkins's testimony described the impact of the manner of her mother's death on her. She did not describe the crime. She described the nightmares that came to her as part of her description (not fully set out in this opinion) of the broad impact her mother's murder had on her ability to work and rest and enjoy life. This, too, would have affected the jury. But this is "evidence of the specific harm caused by the defendant." *Payne*, 501 U.S. at 825, 111 S.Ct. at 2608. In this case, it is also evidence that balances the mitigation evidence put on by Simmons at the penalty phase--that his death at the hand of the state would injure his family. " '[J]ustice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true.' " *Payne*, 501 U.S. at 827, 111 S.Ct. at 2609, *quoting Snyder v. Massachusetts*, 291 U.S. 97, 122, 54 S.Ct. 330, 338, 78 L.Ed. 674 (1934).

Likewise, Purdy Mitchell's testimony spoke of the Shirley Crooks family's loss. This, too, is harm caused by the murder of which the jury may know. We do not find that her reading of the prayer rendered the sentencing phase of the trial fundamentally unfair when considered in the context of the statutory and nonstatutory mitigating and aggravating statutory circumstances presented by both parties during the penalty phase.

The motion court did not err in overruling the Rule 29.15 motion on these points.

E.

During the penalty phase closing argument, defense counsel argued

> I'll submit to you this: If you, as you sit here today, say to yourself, "You know, as far as Chris Simmons is concerned, the State's right; who cares about age; who cares about no significant history; who cares about the deeds he's done." You basically may say to yourself, "I don't care about Chris Simmons at all," and I'm not at all saying to you that that's the feeling you should have. You've heard all the good things that were said about a seventeen year old kid. Ladies and gentlemen of the jury, if, in fact, you do feel that way about Chris Simmons, then I'm not asking you here to render a life sentence for this kid over here. I'm asking you to give a life sentence for his family. Family and friends that basically have indicated to you, and shown you that a life sentence that you render is not the same in their eyes as the death penalty.
>
> Now, there's no question the State will come up here and say, "Well, you know, Chris Simmons is the one that did everything to his family." Don't you feel responsible for that situation, ladies and gentlemen of the jury, but all I'm saying to you is consider his family. Consider his brothers. Consider the fact that just the fact that he's alive makes a difference to some people, and that, ladies and gentlemen of

> the jury, is certainly a mitigating circumstance that you should consider.

In response, the state's counsel argued

> Look at what his friends and family told you. Isn't that scary? Look at how he repaid their love. Look at what he's done to them, and they're asking you to spare his life so he can remain in prison as a constant reminder to them of the acts he did on that night. Show some mercy to his family, give him death. Look at his family. Look at his little brother. Kenny said it all. Someday I want to grow up to be just like him. To be just like him. Spare those kids of that.

Simmons's counsel did not object. Simmons insists this is ineffective assistance of counsel and contends that this argument offends the due process clause as interpreted by the Eighth Circuit's decision in *Antwine v. Delo*, 54 F.3d 1357 (8th Cir.1995). The state says that the prosecutor's words are acceptable retaliation. Both arguments are incorrect.

Although we doubt the rectitude of the Eighth Circuit's due process conclusions in Antwine,[6] the application of that court's due process analysis in this case does not lead to a reversal.

In *Antwine*, the state's lawyer argued that (1) the death by gas chamber was instantaneous, (2) that the taxpayers of the state ought not be required to support Antwine for "the next 50 years" in prison, and (3) it would be more humane to put

[6]*See Antwine v. State*, 791 S.W.2d 403 (Mo. banc 1990).

Antwine to death "so that his brother can get on with his life, and so that the two children can get on with their lives" than to require them to think about their brother/father in prison every day. *Id.* at 1362- 3. The Eighth Circuit found it constitutionally significant that death by cyanide inhalation was not instantaneous and, as a result, the state's first comment diminished the jury's sense of responsibility by assuring Antwine a quick and easy death. "On this basis [the Eighth Amendment] alone, we hold that Antwine's sentence is constitutionally invalid." *Id.* at 1362.

After announcing this sufficient basis for its holding, a "separate basis for our holding" follows. *Id.* at 1364. The Eighth Circuit characterized the additional issue it addressed as whether the latter two comments (summarized in the preceding paragraph), "***combined with*** the misleading and unsupported description of instantaneous death, were prejudicial enough to render the entire sentencing proceeding fundamentally unfair and a violation of Antwine's right to due process." (Emphasis added.) *Id.* at 1363.

Continuing, *Antwine* embraced a due process analysis that requires consideration of four factors.

> We must: (1) measure the type of prejudice that arose from the argument; (2) examine what defense counsel did in his argument to minimize the prejudice; (3) review jury instructions to see if the jury was properly instructed; and (4) determine it there is a reasonable probability that the outcome of the sentencing phase would have been different, taking into account all of the aggravating and mitigating circumstances.

Id. at 1363.

Under the *Antwine* rubric, the state's comment was improper--even as retaliation--because " 'it does not reflect the properly considered circumstances of the crime or the character of the individual.' " *Antwine*, 54 F.3d at 1364, *quoting Blair*, 916 F.2d 1310, 1323 (8th Cir.1990). Using the Eighth Circuit's language, the state's comment here was also "prejudicial,"[7] but not necessarily outcome determinative.[8]

It does not follow, however, that the state's comment requires a reversal of the death sentence. First, it is the combination of the instantaneous death argument--an Eighth Amendment violation--with the economic burden argument that offends the Eighth Circuit's constitutional sensibilities. In reaching its "separate basis" for reversal of the death sentence in *Antwine*, the court said

> There is no doubt that Antwine killed Eric "George" Jones in the police holding cell, but the two aggravating circumstances presented to the jury were balanced by some nonstatutory mitigating circumstances that could have led the jury to choose life imprisonment ***if the prosecutor had not fed their fears of economic burden while easing their conscience with the idea of a quick, humane death."***

(Emphasis added.) Contrary to Simmons's assertion, *Antwine* does not rest on the state's comments about the defendant's family.

Second, we apply *Antwine's* four-stepped due process inquiry. (1) The state's challenged comment did not diminish the jury's sense of responsibility in imposing the death sentence. The state's argument focused the jury on the harsh reality of a death sentence on Simmons's family. This is the ground upon which defense counsel's strategy asked that the debate take place. That the state had a contrary view of what was best for the family did not diminish the jury's sense of the stark choice it faced. In fact, it heightened it. (2) Defense counsel raised the issue of the impact of the death sentence on Simmons's family initially in an attempt to persuade the jury that the family would suffer if the defendant died at the state's hand. The state's counterpoint must be read against Simmons's counsel's argument. When that is done, one cannot say that the jury deliberated without the benefit of a balanced argument. (3) The jury received instructions that reminded it that argument is not evidence. And as to the state's argument about what would be best for Simmons's family, nothing the state said could be misconstrued by the jury as factual evidence. The argument condemned in *Antwine* alluded to a factual basis for the belief that incarceration for life held an economic burden for taxpayers that the death penalty would relieve. (4) We find no reasonable probability that the jury would have reached a different decision on punishment if the state had not said the words Simmons now challenges. The state's argument falls into the *Blair* exception--constitutional foul without constitutional harm. In our parlance, we conclude that no prejudice to defendant resulted from the state's argument.

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[7]This Court, however, has reserved use of the word "prejudicial" to mean outcome determinative. "Prejudicial" as we use it means a conclusion that trial error results in a reasonable likelihood that the jury would have reached a different result in the absence of the error. *State v. Parker*, 856 S.W.2d 331, 333 (Mo. banc 1993).

[8]*See Antwine*, 54 F.3d at 1363. ("[W]e found no due process violation when the prosecutor made a single, brief comment, even though that comment was so improper and prejudicial that we had 'no hesitation in condemning [it],' " *quoting Blair*, 916 F.2d at 1323.

F.

During the penalty phase closing argument, the prosecutor said:

> Now, the Defendant is [sic] offered certain mitigating circumstances. The Court has instructed you that once you find those aggravating circumstances, which you have to find beyond any doubt--the evidence is overwhelming--that's a given--do those mitigating circumstances outweigh the four aggravating circumstances of what the Defendant has done to the victim and her family? You saw two stark contrasts this morning between the two families obviously in pain.
>
> There's one huge, enormous difference. His witnesses had to look at him when they testified. His witnesses get to visit him whether it's on Wednesdays or Sundays. His witnesses still have him. Shirley's don't. They don't have Wednesday visitation. They don't have Sunday visitation, and they certainly couldn't look at her in the courtroom. That's their cross that they are bearing. That's his choice. ***He chose the evidence that you are going to hear in this case. He chose it.***

(Emphasis added.) Simmons asserts that the emphasized portion of the argument (the only portion Simmons's brief quotes) is a prejudicial, indirect comment on his decision not to testify in the case, a violation of the Fifth and Fourteenth Amendment right to remain silent. Defense counsel did not object. Was this ineffective assistance, as Simmons claims?

We do not read the prosecutor's statement as a comment on Simmons's failure to testify. Read in context, the prosecutor's statement reflects a belief that Simmons chose to murder Shirley Crook and to do so in the manner in which he did. The prosecutor's argument places the blame for the pain and loss that both Simmons's family and the Crook family bore on Simmons's decision to commit murder. We find no intent to speak to Simmons's failure to testify in the state's argument, and thus no error. Therefore, counsel cannot be ineffective where the state's argument conformed to the law.

XIII.

Section 565.035.3 Review

Section 565.035.3, RSMo, requires this Court to determine

> (1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor; and
>
> (2) Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in subsection 2 of section 565.032 and any other circumstance found;
>
> (3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime, the strength of the evidence and the defendant.

A.

Simmons claims that the death penalty recommended by the jury and imposed by the trial court in this case was the result

of the influence of passion, prejudice, or arbitrary factors. He claims that the victim impact evidence, the prosecutor's closing argument, and the prosecutor's alleged assertion that Simmons's age was an aggravating and not a mitigating factor all require a reversal of the death penalty. We have previously considered these claims. They are without merit.

In addition, Simmons's now claims that the jury's inability to hear evidence of his child abuse, psychological and emotional damage, drug and alcohol addiction, and his relationship with the felon, Brian Moomey, rendered the imposition of the death penalty arbitrary. We have previously determined that Simmons's counsels' decision not to focus on this evidence during the penalty phase was a reasonable strategic decision. Section 565.035.3 review does not require reversal of the death sentence because a reasonable strategic decision does not result in the outcome the defendant prefers.

B.

Simmons contends that the evidence is insufficient to support the jury's finding of the statutory aggravating circumstances. He bases this argument on the grounds that his confession was illegally obtained. Absent the confession, there would be no evidence that he had murdered Shirley Crook either for pecuniary gain or to avoid lawful arrest. As discussed previously, Simmons's confession was not illegally obtained. Thus, there was ample evidence to support finding the two statutory aggravators in question.

As to the depravity of mind aggravator, Simmons again contends that this is unconstitutionally vague. Again, as we previously determined, the aggravator was not unconstitutionally vague and there was ample evidence to find that Simmons killed Shirley Crook after she had been bound. Simmons's arguments are meritless.

C.

Simmons claims that this Court's practice of proportionality review violates due process. This Court rejected a similar claim recently in *State v. Ramsey*, 864 S.W.2d 320 (Mo. banc 1993), *cert. denied*, 511 U.S. 1078, 114 S.Ct. 1664, 128 L.Ed.2d 380 (1994). The point is denied.

D.

Simmons next claims that the imposition of the death penalty is arbitrary because it is the product of unrestricted prosecutorial discretion. This Court rejected a similar argument in *State v. McMillin*, 783 S.W.2d 82 (Mo. banc 1990), *cert. denied*, 498 U.S. 881, 111 S.Ct. 225, 112 L.Ed.2d 179 (1990). We continue to adhere to the views expressed in *McMillin*.

E.

Simmons also claims that Missouri's death penalty statute achieves no legitimate governmental goal and is therefore excessive. This Court rejected this argument is *State v. Newlon*, 627 S.W.2d 606 (Mo. banc 1982), *cert. denied*, 459 U.S. 884, 103 S.Ct. 185, 74 L.Ed.2d 149, *reh'g denied*, 459 U.S. 1024, 103 S.Ct. 391, 74 L.Ed.2d 520 (1982). The point is denied.

F.

Proportionality

In considering whether the death sentence imposed in this case is proportionate, we consider the death sentence imposed in other cases. The jury found three aggravating circumstances: that Simmons committed the murder for pecuniary gain, section 565.032.2(4); that Simmons committed

the murder to avoid a lawful arrest, section 565.032.2(10); and that the murder involved depravity of the mind.

Where a murder has been committed for pecuniary gain and/or for the purpose of avoiding identification of the defendant by the victim, this Court has upheld the death sentence in *State v. Copeland*, 928 S.W.2d 828 (Mo. banc 1996); *State v. Kreutzer*, 928 S.W.2d 854 (Mo. banc 1996); *State v. Nunley*, 923 S.W.2d 911 (Mo. banc 1996); *State v. Weaver*, 912 S.W.2d 499 (Mo. banc 1995); and at least six other cases. In *State v. Tokar*, 918 S.W.2d 753 (Mo. banc 1996), the death penalty was recommended where the defendant exhibited depravity of mind by killing the victim while the victim had been bound. *See also State v. Oxford*, 791 S.W.2d 396, 402 (Mo.1990) (finding depravity of mind where the murder victim was bound and gagged with duct tape and beaten.) The death penalty has also been given in cases involving youthful offenders. *State v. Wilkins*, 736 S.W.2d 409 (Mo. banc 1987), and *State v. Richardson*, 923 S.W.2d 301 (Mo. banc 1996).

The death penalty imposed in this case is proportionate to the sentence imposed in similar cases. The point is denied.

XIV.

The judgment of guilt of first degree murder, the sentence of death and the judgment overruling the defendant's Rule 29.15 motion are affirmed.

All concur.

IN THE MISSOURI SUPREME COURT

STATE OF MISSOURI ex rel. CHRISTOPHER SIMMONS,	)
Petitioner,	)
vs.	) **No.**
	) **DEATH PENALTY**
AL LUEBBERS, Superintendent, Potosi Correctional Center,	) **CASE EXECUTION**
	)**SCHEDULED: JUNE 5,**
	)**2002 12:01 A.M.**
Respondent.	)

WRIT SUMMARY

Identity of the parties and their attorneys in the underlying action, if any: none.

Nature of underlying action, if any: none.

Action of Respondent being challenged, including date thereof: Petitioner challenges Respondent's illegal detention of Petitioner under sentence of death. Such illegal detention began in 1994 and is continuing.

Relief sought by Relator or Petitioner: Petitioner request that his unlawful sentence of death be vacated.

Date case set for trial, if set, and date of any other event bearing upon relief sought (e.g., date of deposition or motion hearing): Petitioner is scheduled to be executed on June 5, 2002 at 12:01 a.m.

IN THE MISSOURI SUPREME COURT

STATE OF MISSOURI ex rel. CHRISTOPHER SIMMONS,	)
Petitioner,	)
vs.	) **No.**
	) **DEATH PENALTY**
AL LUEBBERS, Superintendent, Potosi Correctional Center,	) **CASE EXECUTION**))**SCHEDULED: JUNE)5, 2002 12:01 A.M.**
Respondent.	)

PETITION FOR WRIT OF HABEAS CORPUS

COMES NOW petitioner, Christopher Simmons, by and through counsel, Patrick J. Berrigan and Jennifer Brewer, and moves this Court pursuant to Rule 91 to issue its Writ of Habeas Corpus in this case granting relief to Mr. Simmons from his unconstitutional sentence of death. In support of his petition, Mr. Simmons states as follows:

FACTUAL BACKGROUND

1. Petitioner Christopher Simmons is currently confined by Al Luebbers, Superintendent, at Potosi Correctional Center, under sentence of death. (See attached warrant of execution) Following conviction for first degree murder and recommendation of a sentence of death by a Jefferson County, Missouri jury, the court sentenced Mr. Simmons to death on August 19, 1994.

2. Christopher Simmons' attorney filed an amended petition for postconviction relief with the motion court on March 24, 1995. Following an evidentiary hearing, the court denied the postconviction relief motion on January 3, 1996. Mr. Simmons filed a notice of appeal with the Missouri Supreme Court on February 7, 1996. This Court affirmed the conviction and sentence in ***State of Missouri v. Christopher Simmons***, 944 S.W.2d 165 (Mo. 1997). A motion for rehearing was denied on May 27, 1997. Mr. Simmons then petitioned the United States Supreme Court for certiorari on July 2, 1997. The Court denied the petition on November 3, 1997 in ***Simmons v. Missouri***, 118 S.Ct. 376 (1997).

3. Mr. Simmons filed his petition for writ of habeas corpus in the United States District Court, Eastern District of Missouri, on July 15, 1998. The petition was denied in two parts, first on March 24, 1999, and finally on August 5, 1999. A motion to alter or amend the district court's March 24, 1999 judgment was denied on August 5, 1999. A motion to alter or amend the August 5, 1999 judgment was denied on September 28, 1999.

4. On September 7, 1999, Mr. Simmons filed a notice of appeal with the Eighth Circuit Court of Appeals. Following briefing and oral argument, the Eighth Circuit denied the appeal on January 2, 2001. On February 22, 2001, Mr. Simmons' petition for rehearing and for rehearing en banc was denied. Chief Judge Wollman, Judge McMillian, and Judge Richard S. Arnold would have granted the petition.

5. On July 26, 2001, Mr. Simmons filed a Petition for Writ of Certiorari with the United States Supreme Court. That petition was denied on October 1, 2001. Application for rehearing of the petition was denied on February 19, 2002.

6. On April 2, 2002, the Missouri Supreme Court set an

execution date of May 1, 2002. On April 24, 2002, the Missouri Supreme Court postponed the execution date to June 5, 2002. A clemency petition is currently pending with Governor Bob Holden. No other pleadings are currently pending.

7. Christopher Simmons' restraint is illegal and improper because such restraint violates the Eighth Amendment to the United States Constitution and Article I, §21 of the Missouri Constitution, which prohibit cruel and unusual punishment; and the Sixth and Fourteenth Amendments to the United States Constitution and Article I, §10 of the Missouri Constitution, which guarantee due process of law, in that these provisions prohibit the execution of any juvenile under eighteen years of age. No petition for the relief sought here has been made to any higher court than this Court.

SUGGESTION IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS

CHRISTOPHER SIMMONS' SENTENCE OF DEATH VIOLATES THE EIGHTH AMENDMENT AND ARTICLE I, §21 OF THE MISSOURI CONSTITUTION'S BAN ON CRUEL AND UNUSUAL PUNISHMENT, AND THE DUE PROCESS CLAUSE OF THE SIXTH AND FOURTEENTH AMENDMENTS AND ARTICLE I, §10 OF THE MISSOURI CONSTITUTION, IN THAT A NATIONAL CONSENSUS, THE EVOLVING STANDARDS OF DECENCY AND THE DOCTRINE OF JUS COGENS NOW EXIST THAT EXPRESSLY FORBID EXECUTION OF JUVENILE OFFENDERS.

I. Evolving Standards of Decency Have Made the Execution of Juvenile Offenders Contrary to the Eighth Amendment

In ***Stanford v. Kentucky***, 492 U.S. 361, 380 (1989) (plurality opinion), the Court considered the constitutionality of the juvenile death penalty and concluded: "We discern neither a historical nor a modern societal consensus forbidding the imposition of capital punishment on any person who murders at 16 or 17 years of age." In the thirteen years since ***Stanford***, such consensus has developed. This is evidenced by the emerging "pattern of federal and state laws" towards abolition of the juvenile death penalty, by a growing and uncontroverted body of research providing that a juvenile's brain development is significantly undeveloped as compared to the adult brain, and by the number of respected organizations that have taken a stance against the juvenile death penalty.

A. The emerging "pattern of federal and state laws" favors the abolition of the death penalty for those under the age of eighteen

In ***Stanford***, the Court concluded that when assessing contemporary standards of decency a primary consideration should be "the pattern of federal and state laws." ***Id.*** at 373. Since ***Stanford***, Montana and Washington have both banned the execution of juvenile offenders. Most recently, in just March of this year, Indiana passed a law banning the execution of juvenile offenders. This brings the total to ***twenty-eight*** states that disallow the death penalty as an option for juvenile offenders. In addition, the federal government's 1994 federal death penalty act set the minimum age for death penalty eligibility at 18.

Every other legal trend in this area reflects a growing

rejection of the death penalty for those under eighteen. This year, six states (in addition to Indiana) are considering or have considered legislation to bar the juvenile death penalty – Missouri, Kentucky, Mississippi, Arizona, Pennsylvania, Florida. Kentucky Governor Paul Patton said he would support the bill banning the execution of juveniles. The Florida senate passed the bill 34-0. Although not compelled to do so by law, Virginia overturned the death sentence of its only juvenile on death row within the last year. Furthermore, the reversal rate for death sentences imposed on juvenile offenders is 89%, and juvenile death sentences have dropped to only 2.7% of the total number of death sentences imposed in the United States since 1973.

In addition to the legal trends, public policy shows the nation's "evolving standards of decency" have come to oppose the juvenile death penalty. In a 1994 study, only 35% of death-qualified mock jurors were willing to sentence 17-year-old defendants with the death penalty. A 2001 National Opinion Research Center study showed that 62% support the death penalty, but only 34% favor it for those committing murder when under the age of 18. In looking exclusively at the Midwest, the study revealed that only 31.5% favored the juvenile death penalty. Indeed, with Indiana's recent statute repealing the death penalty for juveniles, Missouri is the lone Midwestern state with the juvenile death penalty on its books.

B. Scientific Research Supports the Notion That Juveniles Do Not Have the Requisite Culpability to be Eligible for the Death Penalty

By their very nature, teenagers are less mature, and therefore less culpable, than adults who commit similar acts but have no such explanation for their conduct. Adolescence is a transitional period of life when cognitive abilities, emotions, judgment, impulse control, identity - even the brain - are still

developing. Over the last five years, neuroscientific research has discovered that the adolescent brain is in fact far less finished than previously believed. One of the last parts of the brain to mature, the prefrontal cortex, is that part which controls the making of sound judgments and the calming of unruly emotions. At the same time, the part of the brain where raw emotions such as anger are generated, is entering a stage of development that pushes it into overdrive.[1]

The prefrontal cortex is the supervisor of our brain. It enable us to regulate our thoughts and to decide whether to cultivate or dismiss them. It plans, strategizes, and envisions consequences. Abnormalities in the frontal lobe of adult brains are associated with adults who commit murder. It is the prefrontal cortex in "normal" adults that recognizes our violent thoughts and then dismisses them as wrong without acting on them. Unfortunately, this is the part of the brain that undergoes more change during adolescence than any other part of the brain.[2] As a result, adolescents do not have the capacity to use the prefrontal cortex nearly as much as the amygdala, the more emotional and aggressive part of the brain. Even the most sophisticated-appearing teenagers rely heavily on this emotional part of the brain, as MRI scans have shown.[3] In short, what we know now that we did not know at the time of ***Stanford*** is that adolescents do not have the same ability as the rest of us to

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[1]*See* Brownless, Shannon. "Inside the teen brain: Behavior can be baffling when young minds are taking shape." *Lewis-Clark State College*. Undated.

[2]Giedd, Jay. Interview with Public Broadcasting Services. *See* www.pbs.org/wgbh/Pages/frontline/shows/teenbrain/interviews/giedd.html.

[3]Yurgelun-Todd, Deborah. Interview with Public Broadcasting Services. *See* www.pbs.org/wgbh/pages/frontline/shows/teenbrain/interviews/nelson.html.

think about their thoughts, to judge them as right or wrong, and to stop them from guiding their behavior.

The adolescent's biological inability to control his actions is highly significant in the consideration of whether the death penalty is an appropriate punishment for juvenile offenders. One well-grounded principle of death penalty law holds "that punishment should be directly related to the personal culpability of the criminal defense." ***California v. Brown***, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring). Courts have long accepted the fact that adolescents are less mature and responsible than adults, and that therefore, less culpability should attach to a crime committed by a juvenile rather than an adult. *See* ***Thompson v. Oklahoma***, 487 U.S. 815, 834-35 (1988) (Stevens, J., plurality opinion). Scientific proof now exists to support this proposition. That proof demonstrates that this crucial brain development is continuing when the juvenile is 16 or 17 years old. Therefore, because juveniles under the age of 18 are, in fact, not capable of being as culpable as adults are, their execution violates due process and the prohibition against cruel and unusual punishment.

C. Missouri Laws Recognize that Juveniles Are Not Able to Handle the Responsibilities and Rights of Adults

Missouri recognizes the need for restricting the rights of the "less mature and responsible" juveniles throughout its constitution and statutory scheme. For example, Article VIII, §2, of the Missouri Constitution provides that Missourians must be 18 years old before they are granted the right to vote. Likewise, Missouri citizens must be 21 years old before they can serve on a jury. Ironically, this means that, by law, not one member of the jury that convicted Chris and sentenced him to death cold have been a "jury of his peers." Our State's increasing recognition of the need to protect our juveniles was

most recently seen in the drivers' licenses' statutes. The state originally granted the privilege to drive at the age of sixteen. Effective January 1, 2001, a new statute was put in place, allowing children between the ages of sixteen and eighteen to obtain only an "intermediate driver's license." Among other things, the "intermediate licence" requires that the juvenile have a permit for 6 months before the license can be obtained, and verification of at least 20 hours of supervised driving experience under this permit. Once the "intermediate license" is issued, the juvenile is still not allowed to drive between 1 a.m. and 5 a.m. until he turns 18 and gets his ordinary driver's license.

Other examples of Missouri statutes that seek to protect our children by restricting their rights are the marriage license statute, which requires parental consent to obtain a license for children under 18; the pornography statute that makes it a crime to distribute pornography to minors under the age of 18; and the state lottery statute that prohibits the sale of tickets to anyone under the age of 18. Finally, Missouri's refusal to give children the right to consume alcohol or to purchase tobacco, are probably the clearest examples of our recognition that juveniles are not capable of acting with the same maturity and responsibility as adults. The State's clear and continuing recognition of the need to protect juveniles by restricting their rights, combined with the evolving standards of decency of our society as a whole, compels the conclusion that the execution of juveniles now runs afoul of the Eighth Amendment and Article I, §21 of the Missouri Constitution prohibiting cruel and unusual punishment. Any other conclusion is inconsistent with every other aspect of Missouri law.

D. The Juvenile Death Penalty is Uniformly Rejected by Children's Organizations Throughout the United States.

A number of organizations such as the American Bar Association, the Child Welfare League of America, the Children's Defense Fund, the National Center for Youth Law, the Juvenile Law Center, the Coalition for Juvenile Justice, the American Society for Adolescent Psychiatry, the American Academy for Child and Adolescent Psychiatry, the American Psychiatric Association, and the National Mental Health Association urge that the execution for a crime committed while a juvenile is simply unacceptable in a civilized society. This recognition by such respected organizations in our society speaks volumes as to how the standards of decency in our nation have evolved. *See* ***Stanford***, 492 U.S. at 388 ("Further indicators of contemporary standards of decency that should inform our consideration of the Eighth Amendment question are the opinions of respected organizations." (Brennan, J., dissenting).

II. The Application of Capital Punishment to Juveniles is Anathema to Principles of International Law and is Forbidden by the Principle of *Jus Cogens*.

In continuing to execute juvenile offenders, the United States acts in defiance of substantial international consensus and law. Indeed, such executions have all but ended around the world, except in the United States. In the last decade, the United States has executed more juvenile offenders than all of the world's nations combined. The only other countries that still execute juveniles are Iran, the Democratic Republic of Congo and the United States (China, Yemen and Pakistan have recently abolished the use of capital punishment for juveniles). Furthermore, just this past year, Iran stated that it no longer executes juvenile offenders, while the leader of the Democratic Republic of Congo commuted the death sentences of four juvenile offenders.

The death penalty for juvenile offenders is expressly

prohibited by the International Covenant on Civil and Political Rights (ICCPR), the U.N. Convention in the Rights of the Child (CRC), and the American Convention of Human Rights. This overwhelming tide of international sentiment against juvenile executions is highly relevant to the issue. ***Stanford v. Kentucky***, 492 U.S. at 389. ("Our cases recognize that objective indicators of contemporary standards in the form of legislation in other countries is also of relevance to Eighth Amendment analysis." (Brennan, J., dissenting).

Since the end of World War II, the death penalty for juvenile offenders has been expressly prohibited by numerous international norms, such as the provisions of the International Covenant on Civil and Political Rights ("ICCPR"),[4] the United Nations Convention on the Rights of the Child[5] and several other international agreements and treaties.[6] In ratifying the ICCPR, the U.S. Senate passed a resolution containing a "reservation" purporting to nullify the exclusions of juveniles from the death penalty. But the existence of such an international law norm is now incontrovertible and undeniable. Indeed, numerous sovereign governments, including Sweden, The Netherlands, Finland, Germany, Denmark, Norway, France,

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[4]Article 6(5), Dec. 19, 1966 6 I.L.M. 368, 370 (entered into force Mr. 23, 1976) ("Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age. . .").

[5]Article 37(a), G.A. Res. 1386 (XIV), 14 U.N. GAOR Supp. No. 16 at 19, U.N. Doc. A/4354 (1959) ("Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age").

[6]See, e.g. American Convention on Human Rights, Article 4(5), Nov. 22, 1969, I.L.M. 673, 676 (entered into force July 18, 1978) ("Capital punishment shall not be imposed upon persons who, at the time of the crime was committed, were under eighteen years of age. . ."). The United States signed, but never ratified , the American Convention.

Italy, Portugal, Belgium and Spain, filed "objections" to the U.S. reservation, in that the reservation was diametrically opposed to the object and purpose of the Covenant itself.[7]

The prohibition on the execution of juvenile offenders is most clearly embodied in the Convention on the Rights of the Child, a multilateral treaty which the President of the United States has signed without reservation and which every organized nation in the world, except the United States, has ratified. It is also expressed in three other multilateral treaties the United States has ratified, including the ICCPR. This norm has been expressed or agreed to by every competent international body. It is followed by almost every other nation in the world, excluding the United States.

Almost every other country in the world adheres to one or more treaties forbidding juvenile executions. Therefore, a norm of *jus cogens* forbidding the capital punishment of juveniles may resolve differences between international law and those state jurisdictions that still subscribe to capital punishment of juveniles. *Jus cogens* is a principle that shapes and limits the legislative powers of sovereign nation-states. In particular, the principle restrains nations from transgressing upon those interests deemed based and fundamental to the international order. Accordingly, *jus cogens* norms protect the most compelling and essential interests of the international community and form the foundation of the international legal system. Because these norms preserve the fundamental interests of the community of nations, *jus cogens* norms invalidate all state actions that are inconsistent with their terms. Inherent in *jus cogens*, therefore, is the understanding that despite the justifications of state sovereignty, nation-states may

[7] *See*, generally, William A. Schabas, *Invalid Reservations to the International Covenant on Civil and Political Rights: Is the United States Still A Party?*, 21 Brook. J. Int'l L. 277 (1995).

not violate, by treaty or by practice, the compelling interests of the global community embodied in *jus cogens* norms.[8] Clearly, should the United States continue to allow the execution of juvenile offenders, the *jus cogens* norm against such practice would be impermissibly violated.

III. Conclusion

National and international trends, both legally and as a matter of public policy, make clear the fact that our standards of decency have evolved since the Supreme Court's 1989 decision in ***Stanford***. The execution of a seventeen-year-old juvenile offender now constitutes cruel and unusual punishment under the Eighth Amendment to the United States Constitution and Article I, §21 of the Missouri Constitution. Christopher Simmons' restraint under sentence of death is therefore illegal and improper. Only this Court's writ can cure this Constitutional violation.

WHEREFORE, petitioner Christopher Simmons respectfully requests that this Court issue its Writ of Habeas Corpus in this case vacating his unconstitutional sentence of death.

RESPECTFULLY
SUBMITTED,

/s/ Jennifer Brewer for
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ATTORNEYS FOR PETITIONER

CERTIFICATE OF SERVICE

Undersigned counsel hereby certifies that true and accurate copies of the foregoing "Writ Summary" and "Petition for Writ of Habeas Corpus" were mailed on this 2nd day of May, 2002 by regular U.S. Mail, postage prepaid, to:

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Assistant Attorney General
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Attorney for Respondent

/s/ Jennifer Brewer
Counsel for Christopher Simmons

IN THE SUPREME COURT OF MISSOURI
EN BANC
September Session 2002

State ex rel. Christopher Simmons,
Petitioner,

vs. **No. SC84454** **WRIT OF HABEAS CORPUS**

Al Luebbers, Superintendent,
Potosi Correctional Center,
Respondent,

THE STATE OF MISSOURI
to
AL LUEBBERS, Superintendent,
Potosi Correctional Center,

GREETINGS:

You are hereby commanded that you file return to the Supreme Court of Missouri, en Banc, at Jefferson City, Missouri, showing the time and cause of detention of Christopher Simmons, who is in your custody detained, as it is said, under safe and secure conduct.

You are further COMMANDED that the production of the person of the petitioner, Christopher Simmons is waived, but you should file your written return with the Supreme Court of Missouri, en Banc, at the Supreme Court Building, in the City of Jefferson, on or before **December 11, 2002**, thereafter to do and receive what shall then and there be adjudged concerning the said Christopher Simmons, so by you detained as aforesaid, and hereof fail not at your peril, on date aforesaid.

Given under my hand and seal of

said Court, at the City of Jefferson, this 26th day of November, 2002.

\s\ Thomas Simon Clerk

\s\ Norma Jean Creach D.C.

IN THE SUPREME COURT OF MISSOURI

STATE OF MISSOURI EX REL. CHRISTOPHER SIMMONS,	)	
Petitioner,	)	
v.	)	No. 84454
AL LUEBBERS,	)	
Respondent.	)	

RETURN

Comes now respondent, by and through counsel, and states as follows as his return to the November 26, 2002 writ of habeas corpus.

Statement of Custody and Parties

Named petitioner, Christopher Simmons, is currently incarcerated at the Potosi Correctional Center located in Mineral Point, Missouri, pursuant to the sentence and judgment of the Circuit Court of Jefferson County, Missouri. Petitioner was found guilty of murder in the first degree, §565.020, RSMo. 1994, for which he was sentenced to death on August 14, 1994. Petitioner awaits execution. Don Roper, the current Superintendent of the Potosi Correctional Center, is petitioner's custodian and is the proper party respondent. Missouri Supreme Court Rules 91.04, .07.

Statement of the Issue

Petitioner contends that his sentence of death violates the state and federal constitutional bans on cruel and unusual

punishment and the state and federal constitutional provisions according due process, "in that a national consensus, the evolving standards of decency and the doctrine of jus cogens now exists that expressly forbid execution of juvenile offenders." (Petition, page 4).

Procedural Background

On August 19, 1994, petitioner received a sentence of death following his conviction upon one count of first degree murder. Section 565.020, RSMo. 1994. Petitioner filed a direct appeal, and then filed a motion to vacate, set aside or correct the judgment or sentence of the trial court pursuant to Missouri Supreme Court Rule 29.15. Petitioner's appeal from the denial of the Rule 29.15 motion was consolidated with his direct appeal. The facts relating to petitioner's offense are summarized in this court's opinion affirming petitioner's conviction, sentence and the denial of post-conviction relief. State v. Simmons, 944 S.W.2d 165 (Mo. banc 1997). The United States Supreme Court denied a petition for writ of certiorari on November 3, 1997. Simmons v. Missouri, 522 U.S. 953 (1997).

Petitioner sought habeas corpus relief pursuant to 28 U.S.C. §2254 from the United States District Court for the Eastern District of Missouri on July 15, 1998. The district court denied relief upon fourteen of petitioner's fifteen claims on March 24, 1999. Petitioner's remaining ground was denied in a separate memorandum and order dated August 5, 1999. On January 2, 2001, the United States Court of Appeals for the Eighth Circuit affirmed the denial of habeas corpus relief on petitioner's guilt phase and penalty phase claim. Simmons v. Bowersox, 235 F.3d 1124 (8th Cir. 1991). The United States Supreme Court denied the petition for writ of certiorari on October 1, 2001. Simmons v. Luebbers, 122 S.Ct. 280 (2001).

Standard of Review

"Rule 91 proceedings are limited to determining the facial validity of confinement on the basis of the entire record of the proceeding in question." State ex rel. Nixon v. Kelly, 58 S.W.3d 513, 516 (Mo. banc 2001). Rule 91 provides for review in a very limited number of situations. State ex rel. Simmons v. White, 866 S.W.2d 443, 446 (Mo. banc 1993). "[H]abeas corpus is not a substitute for appeal or post-conviction proceedings," id., and failure to raise claims therein "waives them and [the defendant] cannot raise them in a subsequent petition for habeas corpus." State ex rel. Nixon v. Jaynes, 63 S.W.3d 210, 214 (Mo. banc 2001).

This court has allowed state habeas review of procedurally defaulted post-conviction relief claims in extremely narrow circumstances, including "if the petitioner can assert either: (1) a claim of actual innocence or (2) a jurisdictional defect or (3)(a) that the procedural default was caused by something external to the defense -- that is, a cause for which the defense is not responsible -- and (b) prejudice resulted from the underlying error that worked to his actual and substantial disadvantage." Brown v. State, 66 S.W.3d 721, 731 (Mo. banc 2002) (citing Clay v. Dormire, 37 S.W.3d 214 (Mo. banc 2000) and Jaynes, 63 S.W.3d 210).

In Clay, this court elaborated upon the "manifest injustice" exception to permit review of defaulted claims:

> Following the lead of the United States Supreme Court's habeas corpus cases, and most recently Schlup v. Delo, 513 U.S. 298, 327, 130 L.Ed.2d 808, 115 S.Ct. 851 (1995), this Court holds that the manifest injustice or miscarriage of justice standard requires the habeas corpus petitioner "to show that 'a constitutional violation has

> probably resulted in the conviction of one who is actually innocent,'" id. quoting Murray v. Carrier, 477 U.S. 478, 496, 91 L.Ed.2d 397, 106 S.Ct. 2639 (1986), and further, "to establish the requisite probability, the petitioner must show that it is more likely than not that no reasonable juror would have convicted him in the light [of new evidence of innocence]," id.

Clay, 37 S.W.3d at 217. Federal courts have limited the actual innocence gateway to factual innocence as opposed to legal innocence. Pitts v. Norris, 85 F.3d 348, 350-51 (8th Cir.) ("The actual innocence exception is concerned with claims of actual, not legal, innocence. . . . . It is evidence of factual innocence coupled with a constitutional violation which triggers the actual innocence exception" and giving examples of factual innocence including a credible declaration of guilt by another, trustworthy eyewitness accounts proving innocence, and exculpatory scientific evidence) (internal citations omitted), cert. denied, 519 U.S. 972 (1996); accord Embrey v. Hershberger, 131 F.3d 739, 741 (8th Cir. 1997), cert. denied, 525 U.S. 828 (1998); Andrews v. Norris, 108 F.3d 163, 164 (8th Cir. 1997).

Analysis

I. Petitioner's Habeas Corpus Claims Are Procedurally Barred

Now, for the first time in more than five years after this court affirmed the judgment of the conviction and sentence and the denial of post-conviction relief, petitioner claims that his sentence of death violates both the federal and state constitutional provisions of due process and the prohibition against cruel and unusual punishment, on the basis of evolving standards of decency and principles of international law. On these bases now asserted, petitioner did not challenge the constitutionality of the death sentence in his post-conviction

motion or on appeal to this court. In his petition, petitioner makes no attempt to demonstrate that his defaulted claim is reviewable under Rule 91. Indeed, it would appear that petitioner apparently believes to the contrary, based upon representations made in furtherance of a petition filed on his behalf to the Inter-American Commission on Human Rights. See Respondent's Exhibit A, at 1 ("This is an urgent matter as the Victim [Simmons] has exhausted his domestic rights to challenge the conviction that result [sic] in his sentence of death and that sentence."); id. at 9 ("10. Domestic Legal Remedies Yet To Be Pursued -- There are no further legal remedies available to the Victim [Simmons] that will allow him to raise the issues in this complaint.").

Before the motion court, petitioner contended that §565.030, RSMo. 1986 and that MAI-CR3d 313.40 to 313.48 violated due process and freedom from cruel and unusual punishment on the basis that:

(1) "[t]hese instructions and statutes placed the burden of proof upon [sic] to prove to the unanimous satisfaction of the jurors that the mitigating circumstances in order to receive the benefit of his mitigating circumstances. . . . ," Rule 29.15 Legal File, Volume I, at 105;

(2) "MAI-CR3d 313.42 instructed the jury that the only evidence that it could consider in determining whether death was 'warrant[ed]' was that evidence relating to the murder of the victim and the aggravating circumstances. . . . Therefore the jury instructions mandated a decision on whether the aggravating circumstances 'warrant the imposition of death' before the jury is allowed to consider mitigating circumstances. . . . ," id. at 106;

(3) "[t]he only use the jury was specifically instructed that it could make of mitigating circumstances came in MAI-

CR3d 313.44. . . . Combined with MAI-CR3d 313.40, 313.41, and 313.42, these instructions cumulatively forbade the jury from considering mitigating circumstances in the decision of whether death was 'warranted' and the placed the burden of proof on [sic] to prove to the unanimous satisfaction of the jurors that his mitigating circumstances outweighed the aggravating circumstances before he could receive any benefit from them. . . . ," id. at 107;

(4) "MAI-CR3d 313.46 did not cure the constitutional error of MAI-CR3d 313.40, 313.41, and 313.42, which forbade consideration of mitigating circumstances in the determination of whether death was 'warrant[ed]', and 313.44, which shifted the burden of proof to [sic] to prove that mitigating circumstances outweighed aggravating circumstances before he could receive any benefit from those mitigating circumstances. . . . ," id. at 107-108; and

(5) "the instructions are not written in a manner such that they can be comprehended by the average juror . . . . ," id. at 109.

On appeal to this Court, petitioner challenged the constitutionality of his death sentence on the following bases:

(1) "Christopher's death sentence is disproportionate to sentences in similar cases because Christopher is young, only seventeen at the time of the offense, this was his first offense, he suffered a turbulent and abusive childhood, he suffered from mental illness, and was threatened by Brian Moomey, a convicted felon who provided drugs and alcohol to feed Christopher's addiction," Appellant's Statement, Brief And Argument (hereinafter "Appellant's Brief"), at 27;

(2) "[t]his Court's refusal to engage in meaningful proportionality review, including lack of adequate notice and

opportunity to be heard, its refusal to consider all similar cases, its comparison of only other death penalty cases with similar aggravators, and its inadequate data base . . . . ," id.;

(3) "Chapter 565 vests unrestricted discretion in the prosecutor to seek the death penalty . . . . ," id. at 28;

(4) "[t]he death penalty is unjustified as a means of achieving any legitimate governmental goal and is excessive because the State's interest in protecting the public from dangerous criminals who commit violent crimes can be achieved by sentencing such defendants to life imprisonment without probation or parole." id.; and

(5) "[t]he trial court erred in overruling the motion to strike the aggravating circumstance, depravity of mind, and objection to instruction 16 because . . . : "the aggravator is unconstitutionally vague, both facially and as applied as any homicide shows a 'callous disregard for the sanctity of all human life,' and as a result the so-called 'narrowing' definition does not distinguish cases in which the death penalty is imposed from those which are not," id. at 39.

As the foregoing readily demonstrates, petitioner's prior challenges to the constitutionality of his death sentence failed to rely upon international law or evolving standards of decency in regard to the execution of offenders that were under the age of eighteen at the time of the offense. Since petitioner cannot demonstrate an exception to allow review of his defaulted claim, Brown, 66 S.W.3d at 731, there is no basis for this court to consider the underlying merits of petitioner's procedurally defaulted claims.

II. Petitioner's Habeas Claims Do Not Present Jurisdictional Issues

Pursuant to §565.020.2, RSMo. 2000, a person who commits the offense of murder in the first degree and who had reached his sixteenth birthday at the time of commission of the crime is eligible for consideration of the death penalty. Petitioner does not deny that he had reached the age of sixteen at the time he murdered Shirley Crook; in fact, in his appeal to this court, petitioner admitted that he was seventeen years old when he committed the offense (App. Brf., pages 2, 27, 79). The sentencing court acted within its jurisdiction in sentencing petitioner to death upon the jury's verdict. Accordingly, there is not a jurisdictional basis for permitting habeas review of petitioner's defaulted claims.

III. Petitioner Cannot Establish Factual Innocence

As this court stated in Jaynes "[t]here is a balance that must be struck between the need for finality of judgments and the need to accommodate the claims of a purportedly innocent defendant wrongfully convicted." Id., 63 S.W.3d at 215. However, petitioner does not assert that he is actually innocent of the murder of Shirley Crook -- i.e., "'that it is more likely than not that no reasonable juror would have convicted him in light of newly discovered evidence' . . . . ", id. at 216 (quoting Schlup v. Delo, 513 U.S. 298, 327 (1995)), or that he is actually innocent of the death penalty -- i.e., showing "by clear and convincing evidence that, but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty under the applicable state law." Sawyer v. Whitley, 505 U.S. 333, 336 (1992). Indeed, petitioner does not cite newly discovered evidence to establish that he is factually innocent of the murder, Schlup, 513 U.S. at 316, or that there are not statutory aggravating circumstances that make him eligible for the death penalty, Sawyer, 505 U.S. at 347; Lingar v. Bowersox, 176 F.3d 453, 462 (8th Cir. 1999), cert. denied, 529 U.S. 1039 (2000), to serve as the gateway to otherwise permit consideration of the defaulted constitutional claims.

To the extent that petitioner may contend that his status as a juvenile at the time of the murder would render him ineligible for the death penalty, such a contention would be a claim of legal rather than factual innocence. As discussed earlier, federal court have limited the actual innocence gateway to factual innocence as opposed to legal innocence. Pitts, 85 F.3d at 350-51. As the United States Supreme Court made plain in Sawyer, in respect to a sentence of death, "the 'actual innocence' requirement must focus on those elements that render a defendant eligible for the death penalty, and not on additional mitigating evidence that was prevented from being introduced as a result of a claimed constitutional error." Id., 505 U.S. 347. Petitioner's constitutional challenge to his execution as a juvenile offender at the time of the offense does not have any bearing on the existence of the aggravating circumstances that the jury found in this case -- i.e., that the murder was committed for the purpose of receiving money or any other thing of value, that the murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest of defendant, and that the murder involved depravity of mind and as a result thereof, the murder was outrageously and wantonly vile, horrible, and inhuman (Legal File at 278).

Based on the foregoing, petitioner has failed to meet his burden under the manifest injustice exception to permit consideration of his defaulted claim.

IV. Petitioner Cannot Establish Cause to Excuse the Default

To establish cause as the first prong to overcome a procedural default, the petitioner must "'show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule.'" Jaynes, 63 S.W.3d at 215 (quoting Murray v. Carrier, 477 U.S. at 488).

No later than 1992, before petitioner murdered Shirley Crook, he was put on notice that a number of international treaties had been entered into that included a provision against the execution of juvenile offenders, including the International Covenant on Civil and Political Rights (hereinafter "ICCPR"). The United States Senate ratified the ICCPR on April 2, 1992, with an express reservation to Article 6(5) -- the provision precluding the execution of juvenile offenders. Notwithstanding such preexisting international provisions, petitioner failed to assert international trends as a basis for rendering his death sentence constitutionally infirm.[9] Significantly, petitioner also failed to raise this procedurally defaulted claim in his federal habeas proceeding. Under Cause No. 4:97-CV-2415 JCH, petitioner raised the following grounds for relief challenging the sentence of death: VII. Aggravating circumstance of depravity of mind was unconstitutionally vague; XI. Death penalty is administered and applied arbitrarily, capriciously and disproportionately in Missouri; and XII. Section 565.035.3, RSMo. requiring proportionality review as written and applied violates due process. (See Respondent's Exhibit B, at 47-49, 56-57, 57-59 respectively).

Petitioner thus is unable to establish cause for his default -- i.e., to demonstrate that some objective factor external to the defense impeded his effort to raise this basis on direct appeal or in his motion for post-conviction relief. Accordingly, this court should not permit petitioner to circumvent his procedural defaults occurring in the state motion court and before this court previously on appeal, and in federal court as recently as 1998 upon the filing of his federal habeas petition.

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[9]To the extent that petitioner were to contend that his execution violates international law, the claim is not cognizable in a Rule 91 proceeding. See Jaynes, 63 S.W.3d at 214 ("a writ of habeas corpus can be issued when a person is held in detention in violation of the constitution or laws of the state or federal government.").

V. Petitioner is Entitled to No Relief

In Stanford v. Kentucky, the United States Supreme Court held that the Eighth Amendment does not preclude the death penalty for individuals who commit murder at sixteen or seventeen years of age. 492 U.S. 361, 380 (1989). The decision in Stanford was not overruled in Atkins v. Virginia, 122 S.Ct. 2242 (2002). In Atkins, the Supreme Court held that the Eighth Amendment precluded the execution of a mentally retarded offender. Id. at 2252. Petitioner ignores the obvious distinction, and without citing any supporting precedent, instead, urges this court to use "the framework of the reasoning in Atkins . . . . " (Appellant's Suggestions As To The Applicability Of Atkins v. Virginia To The Issues In Mr. Simmons' Case, page 2). "Constitutional rights [,however,] are not defined by inferences from opinions which did not address the question at issue." Texas v. Cobb, 532 U.S. 162, 169 (2001).

Petitioner cannot cite any United States Supreme Court decision that expressly overrules Stanford. Petitioner's reliance upon "the basis for the decision in Atkins" is thus contrary to United States Supreme Court precedent. That petitioner may believe youthfulness is characterized by attributes comparable to those found in mentally retarded individuals, (see Petitioner's Suggestions, page 4) ("juvenile mental state mirrors that of the mentally retarded. . . ."), does not establish that they are one in the same.[10] Indeed, the Supreme Court's holding is limited to

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[10]Unlike mental retardation, youthfulness is not a mental disorder. Compare American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition (DSM-IV). Nor is the significant subaverage intellectual function prong of mental retardation a characteristic of youth status. See, e.g., Johnson v. Texas, 509 U.S. 350, 367

the narrow question presented: "Whether the execution of mentally retarded individuals convicted of capital crimes violates the Eighth Amendment?," Atkins v. Virginia, 122 S.Ct. at 29, and there is no evidence that the Supreme Court considered the issue for which petitioner now seeks relief. Cf., Atkins v. Virginia, No. 00-8452, Tr. of February 20, 2002, Oral Argument, at 2002 U.S. TRANS. LEXIS 19.

The Supreme Court's reference to Stanford in Atkins further refutes any suggestion that the court equated youth with mental retardation and decided the constitutionality of executing a juvenile offender when it decided the constitutionality of executing a mentally retarded offender. There, the Supreme Court noted the distinction between change in legislative enactments prohibiting the execution of the mentally retarded with that prohibiting the execution of juvenile offenders:

> [a] comparison to Stanford v. Kentucky, 492 U.S. 361, 106 L.Ed.2d 306, 109 S.Ct. 2969 (1989), in which we held that there was no national consensus prohibiting the execution of juvenile offenders over age 15, is telling. Although we decided Stanford on the same day as Penry, apparently only two state legislatures have raised the threshold age for imposition of the death penalty. Mont. Code Ann. §45-5-102 (1999); Ind. §35-50-2-3 (1998).

(1993) ("[Youth] is a time and condition of life when a person may be most susceptible to influence and to psychological damage . . . . A lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults . . . . ") (emphasis added; internal citation and quotation marks omitted); Webster's Seventh New Collegiate Dictionary (1966), at 462, 1038, respectively ("juvenile defined as physiologically immature or undeveloped: young"; "youth" defined as "the period of life marked by growth and development; esp: the period between childhood and maturity").

Atkins, 122 S.Ct. at 2249 n.18. Regarding the national consensus issues itself, as the Supreme Court observed in Atkins, when the execution of mentally retarded offenders was previously held constitutional, legislative enactments by two states did "'not provide sufficient evidence at present of a national consensus.'" Id. at 2248 quoting Penry v. Lynaugh, 492 U.S. 302, 334 (1989). Since Stanford, only two states have enacted statutes barring the execution of offenders who committed murder before age eighteen. Atkins, 122 S.Ct. at 2249 n. 18. While petitioner relies upon the consideration of legislation by other jurisdictions rather than the actual passage and enactment of legislation limiting the death penalty to establish an emerging trend favoring abolition of the death penalty for juvenile offenders (Petition, page 5), "the 'clearest and most reliable objective evidence of contemporary values is the legislation enacted by the countries' legislatures.'" Atkins, 122 S.Ct. at 2247 (emphasis added) (quoting Penry, 492 U.S. at 331); accord, Stanford, 492 U.S. at 370). Rather than demonstrating the national consensus, the failure to enact such proposed legislation, at the least, demonstrates no such consensus for abolishing the death penalty for juvenile offenders.

Finally, while petitioner asserts that failure to apply Atkins would violate United States Supreme Court precedent (Petitioner's Suggestions, page 2), petitioner fails to acknowledge that the United State Supreme Court declined to grant review of the very Eighth Amendment issue now raised while Atkins was pending before that court -- and notwithstanding that the petitioner there specifically invoked Atkins. See Beazley v. Texas, No. 01-10329, 122 S.Ct. 2287 (2002) (Respondent's Exhibit C, pages 29-31, 55-59; Respondent's Exhibit D). Similarly, the United States Supreme Court denied an original petition for writ of habeas corpus and a motion for stay which also relied on the pending status of the

Atkins case (Respondent's Exhibit E, pages 40-41, 53-55; Respondent's Exhibit F). In Re Beazley, 122 S.Ct. 2322 (2002). Beazley was executed on May 28, 2002.

While these actions are without precedential value, surely the Supreme Court would have stayed Beazley's execution if that court understood the issue presented in Atkins, and which was decided twenty-three days after Beazley's execution to apply to the execution of juvenile offenders. E.g., Davis v. Texas, 122 S.Ct. 1815 (2002) (granting stay of execution pending decision in Atkins). Similarly, if Atkins were to apply to juvenile offenders, surely these Supreme Court would have granted certiorari in the Beazley case pending the decision in Atkins and thereupon vacated the judgment below and remanded the case for consideration in light of Atkins. See Lawrence v. Chater, 518 U.S. 163, 167 (1996). The Supreme Court invoked the remand mechanism in other cases that had sought certiorari before Atkins was decided. See e.g., Perkins v. Alabama, 122 S.Ct. 2653 (2002); Bell v. Cockrell, 122 S.Ct. 2654 (2002); Modden v. Texas, 122 S.Ct. 2654 (2002).

Similarly, since the Atkins decision, the United States Supreme Court has declined to intervene on the issue of the execution of those who were juveniles when they murdered. See In Re Stanford, 123 S.Ct. 472, 472 (2002); Patterson v. Texas, 123 S.Ct. 24 (2002). Because Stanford v. Kentucky, supra, remains the controlling United States Supreme Court precedent governing the constitutionality of executing an individual that was younger than eighteen at the time that the person committed murder, the writ of habeas corpus should be set aside.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was mailed, postage prepaid, and faxed this 11th day of December, 2002, to:

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SUPREME COURT OF MISSOURI

en banc

State ex rel. Christopher Simmons,	)
	)
Petitioner,	)
	)
vs.	)**No. SC84454**
	)
Donald P. Roper, Superintendent, Potosi Correctional Center,	)
	)
Respondent.	)

ORIGINAL PROCEEDING IN HABEAS CORPUS

Christopher Simmons was sentenced to death for a murder he committed when he was 17 years old. He argues that to execute him for a crime committed when he was under 18 constitutes cruel and unusual punishment.

In ***Thompson v. Oklahoma*, 487 U.S. 815 (1988),** the Supreme Court of the United States held that it constituted cruel and unusual punishment to execute persons who were 15 years of age or younger at the time of their offense. The following year, in ***Stanford v. Kentucky*, 492 U.S. 361 (1989),** the Supreme Court held that there was not then a national consensus against the execution of those who were 16 or 17 years old at the time of their crimes and declined to bar such executions. On that same day, the Supreme Court held that there was not then a national consensus to bar the execution of those who were mentally retarded. ***Penry v. Lynaugh*, 492 U.S. 302 (1989).**

In 1993, Christopher Simmons murdered Shirley Crook. Because of ***Stanford***, he did not argue that his age constituted a bar to imposition of the death penalty, although he did argue that his age was a mitigating circumstance. He was convicted of first-degree murder and sentenced to death in accordance with the jury's verdict. This Court affirmed his conviction and death sentence, as well as the denial of post-conviction relief. ***State v. Simmons*, 944 S.W.2d 165 (Mo. banc 1997), *cert. denied*, 522 U.S. 953 (1997).**[1]

Last year, in ***Atkins v. Virginia*, 536 U.S. 304 (2002),** the Supreme Court held that a national consensus had emerged against the execution of mentally retarded offenders since ***Penry***. Mr. Simmons now asks us to hold that a similar consensus against the execution of juveniles has developed since ***Stanford***, that the rationale for the Supreme Court's determination that the execution of juveniles was not cruel and unusual punishment has disappeared, and that the Eighth Amendment bars his execution.

This Court agrees. Applying the approach taken in ***Atkins***, this Court finds that, in the fourteen years since ***Stanford*** was decided, a national consensus has developed against the execution of juvenile offenders, as demonstrated by the fact that eighteen states now bar such executions for juveniles, that twelve other states bar executions altogether, that no state has lowered its age of execution below 18 since ***Stanford***, that five states have legislatively or by case law raised or established the minimum age at 18, and that the imposition of the juvenile death penalty has become truly unusual over the

[1]The facts underlying Mr. Simmons' crime and conviction are set out in detail in that opinion and will not be repeated here.

last decade.[2] Accordingly, this Court finds the Supreme Court would today hold such executions are prohibited by the Eighth and Fourteenth Amendments. It therefore sets aside Mr. Simmons' death sentence and re-sentences him to life imprisonment without eligibility for probation, parole, or release except by act of the Governor.

I. RETROACTIVE APPLICATION OF JUVENILE DEATH PENALTY

The state contends that this Court should not reach the substantive issue whether the execution of persons for crimes committed as juveniles is prohibited by the Eighth and Fourteenth Amendments, because Mr. Simmons is barred from raising it since he did not do so at the time of his trial. We reject this argument.

In ***Penry***, before reaching the substantive issue whether

[2]The terms "juvenile death penalty" and "juvenile executions" are terms of art used to refer to the execution of those who were under age 18 at the time of their crimes. The term "juvenile" is therefore used in this opinion to refer to those under age 18 when they committed their crime, although the Court recognizes that, for purposes of juvenile division jurisdiction, 17-year-olds are not considered juveniles in Missouri. ***Sec.* 211.031**. Various other states that also treat 17-year-olds as adults for purposes of juvenile court jurisdiction nonetheless do not have a juvenile death penalty - that is, they bar the execution of those under 18 at the time of their crimes. ***See* Office of Juvenile Justice and Delinquency Prevention, *OJJDP Statistical Briefing Book* (Apr. 25, 2002), *at* http://ojjdp.ncjrs.org/ojstatbb/html/qa085.html.** Of course, 16-year-olds are also now subject to the death penalty in Missouri even though they *are* considered juveniles by Missouri's court system, although they can be certified to stand trial as an adult. ***Sec.* 211.071**. In Missouri, a 15-year-old can also be certified for trial as an adult but cannot be subjected to the death penalty. ***Id.*** Self-evidently, the death penalty presents different issues than does the issue of who is a juvenile for purposes of juvenile division jurisdiction.

the Eighth Amendment prohibited the execution of the mentally retarded, the Supreme Court considered whether a decision barring such executions would apply retroactively under the principles set out in ***Teague v. Lane*, 489 U.S. 288 (1989).** ***Penry*** answered the question in the affirmative, stating, "[T]he first exception set forth in *Teague* should be understood to cover not only rules forbidding criminal punishment of certain primary conduct but also rules prohibiting a certain category of punishment for a class of defendants because of their status or offense." ***Id.* at 330.** The Supreme Court concluded:

> Thus, if we held, as a substantive matter, that the Eighth Amendment prohibits the execution of mentally retarded persons such as Penry regardless of the procedures followed, such a rule would fall under the first exception to the general rule of nonretroactivity and would be applicable to defendants on collateral review.

Id.

Penry went on to hold that no national consensus against the execution of the mentally retarded existed in 1989. But, ***Atkins*** found that such a consensus had developed by 2002 and that the Eighth Amendment "'places a substantive restriction on the State's power to take the life' of a mentally retarded offender." ***Atkins*, 536 U.S. at 321, *quoting*, *Ford v. Wainwright*, 477 U.S. 399, 405 (1986).** In ***Johnson v. State*, 102 S.W.3d 535, 539-40 (Mo. banc 2003)**, this Court determined that ***Atkins*** applied retroactively. ***Accord Van Tran v. State*, 66 S.W.3d 790, 811 (Tenn. 2001)** (holding prior to ***Atkins*** that new rule barring execution of mentally retarded would be applied retroactively).

In parallel fashion, if, as a substantive matter, the Eighth Amendment prohibits the execution of persons under age 18 at

the time of their offense regardless of the procedures followed, then such a rule would also fall under the first exception to nonretroactivity under ***Teague*** because it would deprive the state of the power to impose the punishment of death on such a person. ***Cf. Penry*, 492 U.S. at 330**. Such a rule would therefore be applicable to persons, such as Mr. Simmons, whose cases are on collateral review, and the usual waiver rules will not apply.[3] ***See also Reed v. Ross*, 468 U.S. 1, 16 (1984)** ("[W]here a constitutional claim is so novel that its legal basis is not reasonably available to counsel, a defendant has cause for his failure to raise the claim in accordance with applicable state procedures.").

II. NATIONAL CONSENSUS AGAINST EXECUTION OF JUVENILES AND THE MENTALLY RETARDED

To determine whether the application of the death penalty to juveniles constitutes cruel and unusual punishment, it is helpful to examine the Supreme Court's decisions in prior cases addressing the execution of juveniles and of the mentally retarded.

A. The Death Penalty for Juveniles: Thompson and Stanford

1. Thompson v. Oklahoma. **In *Thompson*, 487 U.S. 815 (1988)**, the Supreme Court determined that the Eighth Amendment categorically prohibits the execution of those who were 15 years old or younger at the time of their crimes. Using

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[3]Because, here, ***Teague*** requires retroactive application, and because state courts cannot apply retroactivity principles more narrowly than did ***Teague***, there is no need to undertake the ***Stovall v. Denno*, 388 U.S. 293 (1967)**, analysis discussed by this Court in ***State v. Whitfield*, 107 S.W.3d 253, 267-68 (Mo. banc 2003)**.

an approach similar to that which he would utilize in ***Atkins*** some fourteen years later, Justice Stevens, in the principal opinion, said that in determining what constitutes cruel and unusual punishment, judges should be "guided by the 'evolving standards of decency that mark the progress of a maturing society.'" ***Id.*** **at 821,** ***quoting, Trop v. Dulles*****, 356 U.S. 86, 101 (1958)**. Such standards cannot remain static, but must "'acquire meaning as public opinion becomes enlightened by humane justice,'" for "'a principle to be vital must be capable of wider application than the mischief which gives it birth.'" ***Id.*** **at 821 n.4,** ***quoting, Weems v. United States*****, 217 U.S. 349, 373, 378 (1910)**.

To determine current standards of decency, ***Thompson*** examined: (a) relevant legislative enactments, and (b) evidence of how juries viewed the propriety of execution of the mentally retarded. It also considered (c) the views of respected national and international organizations. Finally, in light of the above and other factors, (d) the Supreme Court made its own judgment as to the propriety of such executions and explained "why these indicators of contemporary standards of decency confirm our judgment that such a young person is not capable of acting with the degree of culpability that can justify the ultimate penalty." ***Thompson*****, 487 U.S. at 822-23**.

a. Legislative Enactments. In reviewing statutes governing punishment of children, ***Thompson*** found that "[t]he line between childhood and adulthood is drawn in different ways by various States." ***Id.*** **at 824**. Fourteen state legislatures then barred capital punishment altogether. ***Id.*** **at 826**. In nineteen other states, the legislature permitted capital punishment, but state statutes failed to expressly state the minimum age for its imposition. ***Id.*** **at 826-27**. Eighteen remaining states set a minimum age, varying from 16 to 18. ***Id.*** **at 829**. No legislature had adopted a statute explicitly permitting the execution of those under age 16. ***Id.***

b. Imposition of the Death Penalty. ***Thompson*** also found that juries rarely imposed the death penalty on those under 16, that only eighteen to twenty such persons had been executed in the 20th century, and only one since 1948. ***Id.*** **at 832**. Between 1982 and 1986, only five persons age 15 or younger were sentenced to death in the United States, leading the Court to conclude that, "these five young offenders have received sentences that are 'cruel and unusual in the same way that being struck by lightning is cruel and unusual.'" ***Id.*** **at 833,** ***quoting, Furman v. Georgia*****, 408 U.S. 238, 309 (1972)** (quoting Stewart, J., concurring).

c. National and International Views. As a part of its discussion of legislation, the Supreme Court considered the views of respected national religious, social, and professional organizations, including the American Bar Association ("ABA") and the American Law Institute, both of which it said "have formally expressed their opposition to the death penalty for juveniles." ***Id.*** **at 830**. And, stating that it had "previously recognized the relevance of the views of the international community in determining whether a punishment is cruel and unusual," ***id.*** **at 830 n.31** (citations omitted), the Court also considered the sentencing practices of European and other countries, stating:

> Although the death penalty has not been entirely abolished in the United Kingdom or New Zealand (it has been abolished in Australia, except in the State of New South Wales, where it is available for treason and piracy), in neither of those countries may a juvenile be executed. The death penalty has been abolished in West Germany, France, Portugal, The Netherlands, and all of the Scandinavian countries, and is available only for exceptional crimes such as treason in Canada, Italy, Spain, and Switzerland.

> Juvenile executions are also prohibited in the Soviet Union.

***Id.* at 831-31** (footnote omitted).

d. Independent Analysis. Lastly, ***Thompson*** analyzed the culpability of juveniles as compared to adults and considered whether application of the death penalty to juveniles measurably contributed to the social purposes it was intended to serve. After noting "broad agreement on the proposition that adolescents as a class are less mature and responsible than adults" and "the special mitigating force of youth," the Court concluded that "less culpability should attach to a crime committed by a juvenile." ***Id.* at 834-35**. As to the social rationales of the death penalty - retribution and deterrence - it found them unacceptable for 15-year-old offenders because of the "lesser culpability of the juvenile offender" and because deterrence would not be jeopardized if the execution of those under 16 were prohibited. ***Id.* at 836-37**.

In light of all of these factors, ***Thompson*** concluded that a national consensus existed that execution of persons under 16 at the time of their crimes constituted cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. ***Id.***

2. ***Stanford v. Kentucky***. The following year, in ***Stanford*, 492 U.S. 361**, Justice Scalia stated in the principal opinion that, by contrast, the Eighth and Fourteenth Amendments did not prohibit imposition of the death penalty for crimes committed at age 16 or 17. ***Id.* at 370-77**. In so holding, Justice Scalia agreed that what constitutes cruel and unusual punishment must be determined by current standards rather than by those in effect in 1789. ***Id.*** But, he said, current standards are almost entirely to be determined by reference to "statutes passed by society's elected representatives," ***id.* at 370,**

and specifically by state legislatures. He then noted that, while the majority of states did not permit the execution of juvenile offenders, that count included the fourteen states that then barred capital punishment altogether. ***Id.* at 370 n.2**. If one considered only those states permitting capital punishment, then the majority of that subgrouping approved the execution of those who were 16 or 17 at the time of their offense. ***Id.* at 370**.

And, although ***Stanford*** recognized that juries sentence substantially fewer juveniles than adults to death, it said this did not provide a reason to prohibit such death sentences entirely. ***Id.* at 373-74.** ***Stanford*** also rejected, as irrelevant, the many state statutes barring those under 18 years old from engaging in various activities, such as voting, drinking, or driving. ***Id.* at 374-77**. Similarly, although a year earlier ***Thompson*** had said the views of social, professional, and religious groups, as well as the sentencing practices of other countries, were relevant to determining current standards of decency, ***Stanford*** stated that the views of national organizations were an "uncertain foundation" on which to base constitutional law and that *international* practices were simply irrelevant to whether a *national* consensus existed. ***Id.* at 369 n.1, 377**. After so limiting its inquiry, ***Stanford*** concluded that there was no national consensus against executing offenders who were 16 or 17 at the time of the offense. ***Id.* at 370-72, 379-80**.

B. From Penry to Atkins: Development of a National Consensus Against Execution of the Mentally Retarded.

1. ***Penry v. Lynaugh***. The same day that the Supreme Court held in ***Stanford*** that there was no national consensus against imposition of the death penalty on juveniles, it held in ***Penry*, 492 U.S. 302**, an opinion authored by Justice O'Connor, that there was also no national consensus against imposition of the death penalty on the mentally retarded. Like ***Thompson*** and

Stanford, Penry recognized that what constitutes cruel and unusual punishment is not a static concept, immutably tied to what punishments would have been included within the reach of the Eighth Amendment when the Bill of Rights was adopted in 1789. ***Id.* at 330**. Rather, the "prohibition against cruel and unusual punishments also recognizes the 'evolving standards of decency that mark the progress of a maturing society.'" ***Id.* at 330-31, *quoting, Trop*, 356 U.S. at 101**. And, like ***Stanford, Penry*** looked to statutes passed by state legislatures as the best type of "objective evidence of how our society views a particular punishment today." ***Id.* at 331**. ***Penry*** also said that the Court "looked to the data concerning the actions of sentencing juries." ***Id.***

a. Legislative Action. When ***Penry*** was decided in 1989, only Georgia, Maryland, and the federal government had statutes barring the imposition of the death penalty on the mentally retarded. ***Id.* at 334**. The Supreme Court concluded that "the two state statutes prohibiting execution of the mentally retarded, even when added to the 14 States that have rejected capital punishment completely, do not provide sufficient evidence *at present* of a national consensus." ***Id.*** (emphasis added).

b. Other Factors. Mr. Penry was unable to provide evidence that juries chose not to sentence mentally retarded defendants to death. In addition, on the record before it, the Supreme Court said it could not conclude that "all mentally retarded people, by definition, can never act with the level of culpability associated with the death penalty." ***Id.* at 338-39**. For these reasons, the Court determined that "at present, there is insufficient evidence of a national consensus against executing mentally retarded people convicted of capital offenses for us to conclude that it is categorically prohibited by the Eighth Amendment." ***Id.* at 335**.

2. ***Atkins v. Virginia***. In 2002, the Supreme Court revisited the issue of capital punishment of the mentally retarded in the case of Daryl Atkins, an allegedly mentally retarded man whose death sentence had been affirmed by the Virginia Supreme Court based on ***Penry***'s determination that there is no national consensus against the execution of the mentally retarded. In a principal opinion by Justice Stevens, the Supreme Court reversed Mr. Atkins' death sentence and remanded for a determination of his mental status. ***Atkins*, 536 U.S. 304**. In so holding, ***Atkins*** reaffirmed that whether capital punishment is barred for certain classes of offenders is necessarily part of a fluid, rather than a static, process and that as our standards of decency evolve, so will the determination of what constitutes cruel and unusual punishment. ***Id.* at 312**.

Atkins' analysis more closely resembles that in ***Thompson*** than that in ***Stanford***. ***Atkins***: (a) first looked at the objective evidence of legislative intent provided by state legislation barring the death penalty. (b) Like ***Penry***, it considered the frequency with which the death penalty was imposed on the mentally retarded. (c) It then looked to the opinions of national professional, religious, and social organizations, and the approach of other countries to the death penalty for the mentally retarded. (d) Finally, it undertook an independent examination of whether the imposition of the death penalty on the mentally retarded constitutes cruel and unusual punishment under today's evolving standards of decency. ***Id.* at 313**.

a. Legislative Action. ***Atkins*** found that, in the thirteen years after ***Penry***, fourteen more states - including Missouri - had adopted legislation barring the application of their death penalty laws to the mentally retarded. And, while New York and Nebraska had each reinstated the death penalty, each had specifically exempted the mentally retarded from the reach of those newly enacted statutes. ***Id.* at 314-15**. When these

sixteen new states were added to the two states that had already adopted such legislation in 1989, eighteen states, and the federal government, then prohibited imposition of the death penalty on the mentally retarded. ***See id***. In addition, the Court noted that the Texas legislature had unanimously adopted a bill barring the execution of the mentally retarded, but the bill was vetoed by the governor on other grounds, and that at least one house of the Virginia and Nevada legislatures had similarly adopted bills barring the death penalty for the mentally retarded. ***Id.* at 315.**[4]

While the number of states barring imposition of the death penalty had clearly grown impressively, the Court stated that, "*It is not so much the number of these States that is significant, but the consistency of the direction of change.*" ***Id***. (footnote omitted) (emphasis added). This consistency was further reflected by the fact that, since ***Penry***, no state had adopted a law permitting the execution of the mentally retarded. ***Id.* at 315-16**. The Court found such consistency particularly persuasive given the anticrime atmosphere of the times:

> Given the well-known fact that anticrime legislation is far more popular than legislation providing protections for persons guilty of violent crime, the large number of States prohibiting the execution of mentally retarded persons (and the complete absence of States passing legislation reinstating the power to conduct such executions) provides powerful evidence that today our society views mentally retarded offenders as categorically less culpable than the average criminal.

Id.

b. Frequency of Imposition of Death Penalty. The Court found that some states, such as New Hampshire and New Jersey, whose statutes nominally authorize the execution of mentally retarded persons, had not carried out executions of any persons in decades, thus removing the incentive to pass legislation barring execution of the mentally retarded in particular. ***Id.* at 316**. And, in those states that still carried out executions, the Court found, the practice of executing mentally retarded offenders had become very uncommon: only five persons who were known to have an I.Q. of less than 70 had been executed in the thirteen years since ***Penry***. ***Id***. The Court concluded that "[t]he practice. . . has become truly unusual, and it is fair to say that a national consensus has developed against it." ***Id***.

c. National and International Opposition to Death Penalty. ***Atkins*** stated that the consensus against the death penalty for the mentally retarded was evident not only from the legislation passed over the prior thirteen years, and the rareness of the application of the death penalty in those states that permitted its use, but also from the opposition to the practice from experts in the field, noting "several organizations with germane expertise have adopted official positions opposing the imposition of the death penalty upon a mentally retarded offender," including the American Psychological Association

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[4] In footnote 18, ***Atkins*** contrasted these substantial legislative changes with the fact that, since ***Stanford***, "apparently only two state legislatures have raised the threshold age for imposition of the death penalty" for juveniles, but did not purport to present a complete picture of the legislative activity on the juvenile death penalty since ***Stanford***, an issue not then before it. ***Atkins*, 536 U.S. at 316 n.18** (citations omitted). As discussed *infra*, eleven states and the federal government already barred the death penalty for juveniles when ***Stanford*** was decided, two have done so since, others are considering doing so, two other legislatures have enacted statutes that do not permit execution of those under 18, and the state of Washington has barred juvenile executions by court decision. It is noteworthy that twelve additional states and the District of Columbia bar executions altogether.

and the American Association of Mental Retardation. ***Id.* at 316 n.21**. The Court also found the sentiments of this nation's religious communities, and of the world community, to be overwhelmingly opposed to execution of the mentally retarded. ***Id.*** Finally, the Court cited to polling data that showed "a widespread consensus among Americans, even those who support the death penalty, that executing the mentally retarded is wrong." ***Id.*** While the Court stated that the opposition of these groups was by no means dispositive, the Court did find significant their "consistency with the legislative evidence," stating that it provided "further support to [the Court's] conclusion that there is a consensus among those who have addressed the issue." ***Id.***

d. Independent Judicial Determination. Finally, the Supreme Court undertook an independent evaluation of whether such executions should be prohibited. It found that neither the retributive nor the deterrence justifications for the death penalty would be furthered by executing the mentally retarded, stating, "If the culpability of the average murderer is insufficient to justify the most extreme sanction available to the State, the lesser culpability of the mentally retarded offender surely does not merit that form of retribution." ***Id.* at 319.**[5] It further concluded, "the same cognitive and behavioral impairments that make [mentally retarded] defendants less morally culpable . . . also make it less likely that they can process the information of the possibility of execution as a penalty and, as a result, control their conduct based upon that information." ***Id.* at 320**.

The Court further implicitly rejected the suggestion in ***Penry*** that the death penalty could not be barred if any mentally

[5]In ***Godfrey v. Georgia*, 446 U.S. 420 (1980)**, the Supreme Court set aside a death sentence because the petitioner's crimes did not reflect "a consciousness materially more 'depraved' than that of any person guilty of murder." ***Id.* at 433**.

retarded person might theoretically deserve it, so that the effect of mental retardation should instead simply be considered as a mitigating factor. ***Id.* at 318-19**. Rather, it said, the very fact that persons are mentally retarded not only makes them more likely to give a false confession, but also makes them less able to assist their counsel, typically makes them poor witnesses, and may cause them to exhibit a demeanor that is unsympathetic and that may incorrectly imply a lack of remorse. ***Id.* at 320-21**. Its independent evaluation led the Court to conclude that "death is not a suitable punishment for a mentally retarded criminal." ***Id.* at 321**.

II. APPLICATION OF THE PRINCIPLES SET OUT IN ATKINS, THOMPSON, PENRY, AND STANFORD TO THE EXECUTION OF JUVENILES TODAY

A. Stanford Does Not Preclude This Court from Considering Whether a National Consensus Now Exists Barring the Death Penalty for Juveniles.

The state argues, and the dissenting judges would hold, that whatever the Supreme Court held in ***Atkins*** is irrelevant to the instant case because this Court is bound by ***Stanford*** to hold that there is no constitutional bar to the execution of persons who were 16 or 17 years of age at the time of their crimes. This argument ignores the fundamental premise on which ***Stanford***, as well as ***Thompson***, ***Penry***, and ***Atkins***, were based: that "this Court has not 'confined the prohibition embodied in the Eighth Amendment to 'barbarous' methods that were generally outlawed in the 18th century,' but instead has interpreted the Amendment 'in a flexible and dynamic manner.'" ***Stanford*, 492 U.S. at 369, *quoting*, *Gregg v. Georgia*, 428 U.S. 153, 171 (1976)**. Court should be guided by the conceptions of decency of "modern American society as a whole." ***Id.*** (footnote omitted).

Atkins recently reaffirmed that decisions as to standards of decency are to be decided by current standards, not ones of years ago. ***Atkins*, 536 U.S. at 312**. And, that is just what the issue before this Court requires us to do: determine whether the evolving national consensus bars the imposition of the death penalty on juveniles today, even though it did not bar it fourteen years ago. To say that this determination must be made based on the state of the law and standards that existed when ***Stanford*** was decided in 1989, and that to do otherwise is to overrule ***Stanford***, is simply incorrect. This Court clearly has the authority and the obligation to determine the case before it based on current - 2003 - standards of decency. ***See Patterson v. Texas*, 536 U.S. 984, 985, 123 S.Ct. 24, 24 (2002)** (Ginsburg, J. dissenting from denial of petition for writ) ("This Court's decision in *Atkins v. Virginia 536 U.S. 304 (2002)*, made it tenable for a petitioner to urge reconsideration of *Stanford v. Kentucky*, 492 U.S. 361 (1989) . . . ."); ***In Re Stanford*, 537 U.S. ___, 123 S.Ct. 472 (2002)** (Stevens, J. dissenting from denial of petition for writ) (Court should reconsider *Stanford* in light of *Atkins* because "even if we were not convinced in 1989 [that juveniles should not be subject to the death penalty] we should be all the more convinced today" because of the additional states barring such executions and because of the growth in scientific knowledge of the less than fully developed nature of the adolescent brain.).[6]

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[6]The dissent's suggestions that this Court should infer that the Supreme Court would not apply the ***Atkins*** principles to the juvenile execution context because the Supreme Court has denied petitions for writs in ***Patterson*, *Stanford***, and similar cases involving juveniles itself ignores the fact that the Supreme Court "has rigorously insisted that such a denial carries no implication whatever regarding the Court's views on the merits of the case which it has declined to review. The Court has said this again and again; again and again the admonition has to be repeated." ***Maryland v. Baltimore Radio Show*, 338 U.S. 912, 919 (1950)**; ***see also Teague v. Lane*, 489 U.S. 288, 296 (1989)** (because a variety of considerations underlie the denial of a writ, such denials should be accorded no precedential value). ***Cf. Rodriguez v. Suzuki Motor Corp.*, 996 S.W.2d 47, 61 (Mo. banc 1999)** (denial of petition for writ is not a conclusive decision on the merits of the issue presented).

B. A National Consensus Against the Juvenile Death Penalty.

As the discussion of ***Thompson*, *Stanford*, *Penry*,** and ***Atkins*** makes evident, many of the same principles and factors that have guided the Supreme Court's determination of the constitutionality of the death penalty for the mentally retarded have also guided the Supreme Court's determination of the constitutionality of the death penalty for juveniles. This Court therefore will use ***Atkins***' approach in addressing whether a national consensus has developed against the juvenile death penalty since ***Stanford***, looking at: (1) the extent of legislative action against or in favor of the juvenile death penalty; (2) the frequency of the imposition of the death penalty on juveniles in modern times, and the frequency with which it is carried out even when imposed; (3) national and international opinion on the juvenile death penalty; and (4) an independent examination of whether the death penalty for juveniles violates evolving standards of decency and so is barred by the Eighth and Fourteenth Amendments.

1. Legislative Action Has Consistently Been Against the Juvenile Death Penalty. At the time that ***Penry*** was decided in 1989, only two states had outlawed executing the mentally retarded, and the Supreme Court found that this was not sufficient to constitute a national consensus. In deciding that developments of the intervening years between ***Penry*** and ***Atkins*** demonstrated that a national consensus had developed against executing the mentally retarded, ***Atkins*** relied heavily on the fact that sixteen more state legislatures had barred execution of the mentally retarded, while no additional states had permitted it. It found this persuasive not principally

because of the number of states that had passed such laws, but because of the consistency of the changes in the direction of opposition to the death penalty for the mentally retarded.

That same consistency of change has been shown in opposition to the juvenile death penalty. Indeed, the change was in the process of occurring when ***Stanford*** was decided. At the time of ***Stanford***, eleven states barred the juvenile death penalty. This was substantial, but not yet enough to constitute a national consensus.

Since ***Stanford***, however, and despite what ***Atkins*** called the popularity of "law and order" legislation, five more states have banned the practice of executing juvenile offenders. Two have done so by adopting legislation raising the age of execution to 18,[7] and two have done so by newly reinstating the death penalty, but only for those offenders who were 18 or older at the time of their offense.[8] The Washington Supreme Court has also held that its death penalty statute cannot be construed to authorize imposition of the death penalty for crimes committed by juvenile offenders,[9] thereby adding the state of Washington to the list of states in which the practice is now prohibited. Thus, a total of sixteen states - to which should be added federal civilian and military courts - require a minimum age of 18 for imposition of the death penalty, only two fewer than the eighteen states ***Atkins*** identified as prohibiting

[7]Indiana (S. 426, 112th Leg., Reg. Sess., 2002 In. Laws) and Montana (H.B. 374, 1999 Leg., Reg. Sess., 1999 Mt. Laws).

[8]Kansas (Kan. Crime. Code Ann. sec. 21-46622 (Vernon 2001)) and New York (N.Y. Crim. Proc. Law sec. 400.27 (McKinney 2002)).

[9]***See State of Washington v. Furman*, 858 P.2d 1092, 1102-03 (Wash. 1993).**

execution of the mentally retarded.[10] If the twelve states and the District of Columbia that bar the death penalty entirely are added, the combined total is twenty-eight states that prohibit juvenile executions - two fewer than the thirty states that prohibited execution of the mentally retarded at the time ***Atkins*** was decided.

Moreover, as is the case with the mentally retarded, the change has consistently been in the same direction. No state since ***Stanford*** has lowered the age for execution from 18 to 17 or 16, although ***Stanford*** allowed states to do so.[11] Rather, the minimum age has either stayed the same or been raised, and the only two states to reinstate the death penalty since 1989 did so only for those 18 or older. In addition, many states, including Missouri, have recently considered legislation to raise the minimum age for executions to 17 or 18. **Streib, *supra*, at 7.** This accounts for the most legislative attention to the issue in twenty years. ***Id***. In 2000, a bill to abolish the death penalty in New Hampshire passed both houses of the state legislature, but was vetoed.[12]

[10]While, as noted in footnote 18 of ***Atkins***, this means there were many fewer states that raised their minimum age of execution to 18 after ***Stanford*** than there were states that barred the death penalty for the mentally retarded after ***Penry***, this in part reflects the fact that eleven states had already acted to bar the juvenile death penalty before ***Stanford*** was even decided. It would be the ultimate in irony if the very fact that the inappropriateness of the death penalty for juveniles was broadly recognized sooner than it was recognized for the mentally retarded were to become a reason to continue the execution of juveniles now that the execution of the mentally retarded has been barred.

[11]Victor L. Streib, *The Juvenile Death Penalty Today: Death Sentences and Executions for Juvenile Crimes*, January 1, 1973-June 30, 2003, at 7, *available at* http://www.law.onu.edu/faculty/streib/juvdeath (last modified July 1, 2003).

[12]HB 1548 (N.H. 2000).

2. Infrequency of Imposition of Death Penalty. In ***Atkins***, the Supreme Court also found persuasive the fact that execution of the mentally retarded had become truly unusual. Many states that nominally had the death penalty on their books no longer imposed it at all or had never imposed it on a mentally retarded person, and only a total of five persons known to be mentally retarded had been executed in the United States in the thirteen years following the Court's decision in ***Penry***. ***Atkins*, 536 U.S. at 316.**

The practice of executing those under 18 has become similarly uncommon today. Although twenty-two states theoretically permit the death penalty for juveniles, only six (Missouri, Texas, Virginia, Georgia, Oklahoma, and Louisiana) have actually executed a juvenile offender since ***Stanford*** was decided fourteen years ago. **Streib, *supra*, at 3-4.** Of these six states, only three have executed juvenile offenders since 1993 - Texas, Virginia, and Oklahoma. ***Id.* at 4.** Louisiana last executed a juvenile offender in 1990; Georgia in 1993. ***Id.* at 3.** Missouri executed Frederick Lashley in 1993. That is the only officially recorded execution of a juvenile offender in Missouri since the state took over executions from Missouri's counties in 1937.[13]

Perhaps most telling is that, while at least 366 juvenile offenders have been executed in this country since 1642 (when the first juvenile offender execution occurred), only twenty-two of the 366 were carried out during the current era (1973-2003). ***Id.*** Of these twenty-two executions, Texas, Virginia, and Oklahoma together account for eighty-one percent of the

[13]According to one authority, the only other juvenile execution in Missouri occurred in 1921. American Bar Association, *Cruel and Unusual Punishment: The Juvenile Death Penalty*, Spring 2003, at 2, *available at* http://www.abanet.org/crimjust/juvjus/-factsheets_evolving_standards.pdf (last visited Aug. 1, 2003).

juvenile executions. ***Id.* at 5.** Although Alabama, Arizona, Arkansas, Delaware, Idaho, Kentucky, Mississippi, Nevada, Pennsylvania, South Dakota, Utah, and Wyoming all theoretically permit the death penalty for 16-year-olds, and while Florida, New Hampshire, and North Carolina theoretically permit it for 17-year-olds, none of these states has executed a juvenile since the death penalty was re-established in 1976. ***Id.* at 3-4, 6.** All but South Dakota and New Hampshire, however, have executed other offenders during that period.[14] Indeed, even where juries have imposed a death sentence on a juvenile since the reinstatement of the death penalty in 1976, its application has consistently been reversed by the courts on a variety of grounds, making South Carolina the only other state (other than Texas, Louisiana, Missouri, Georgia, Virginia, and Oklahoma) to carry out a juvenile execution since 1976. ***Id.* at 3.** As the chart attached as Appendix A graphically demonstrates, more mentally retarded persons than juveniles have been executed, in more states, since the death penalty was reinstated in 1976.[15]

As ***Atkins*** noted in regard to the mentally retarded, in light of the small number of executions of juvenile offenders carried out in the last decade, legislatures in states with a juvenile death penalty may have seen little reason to pass legislation barring it. Juveniles are so seldom executed that, other than perhaps in Texas and Virginia, the death penalty for juveniles has become so truly unusual that its potential

[14]These and other statistics about executions are collected by the Death Penalty Information Center and can be found at www.deathpenaltyinfo.org. ***See also*** statistics collected at http://www.asc41.com/policypaper2.html by the American Society of Criminology.

[15]ABA Juvenile Justice Center, *Comparison: Executions of Juveniles and Mentally Retarded Persons by State Since 1976* (Feb. 20, 2003), *at* http://www.abanet.org/crimjust/juvjus/juvandmr.pdf.

application is more hypothetical than real.

But, the likelihood of such an execution is not hypothetical in Missouri today. The state argues that Missouri should become the only state other than Texas, Virginia, and now Oklahoma to carry out more than one juvenile execution since the reinstatement of the death penalty in 1976.

3. National and International Consensus. Opposition to the juvenile death penalty by professional, social, and religious organizations has been longstanding. At the time ***Stanford*** was decided, a large number of groups, including the ABA, child advocacy groups, psychiatric organizations, and church and religious groups filed amicus briefs urging an end to such executions.[16] Since ***Stanford***, additional organizations of professionals have also called for an end to the death penalty,

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[16]***Stanford*** cited the following list of organizations, all of which filed briefs *amicus curiae* in support of the petitioners in ***Stanford***: American Bar Association; Child Welfare League of America; National Parents and Teachers Association; National Council on Crime and Delinquency; Children's Defense Fund; National Association of Social Workers; National Black Child Development Institute; National Network of Runaway and Youth Services; National Youth Advocate Program; and American Youth Work Center; American Society for Adolescent Psychiatry and American Orthopsychiatric Association; Defense for Children International - USA; National Legal Aid and Defender Association; and National Association of Criminal Defense Lawyers; Office of Capital Collateral Representative for the State of Florida; International Human Rights Law Group; American Baptist Churches; American Friends Service Committee; American Jewish Committee; American Jewish Congress; Christian Church (Disciples of Christ), Mennonite Central Committee; General Conference Mennonite Church; National Council of Churches; General Assembly of the Presbyterian Church; Southern Christian Leadership Conference; Union of American Hebrew Congregations; United Church of Christ Commission for Racial Justice; United Methodist Church General Board of Church and Society; and United States Catholic Conference; West Virginia Council of Churches; and Amnesty International. ***Stanford*, 492 U.S. at 388 n.4** (Brennan, J. dissenting).

including: The American Psychiatric Association, The American Academy of Child and Adolescent Psychiatry, The National Mental Health Association, The National Center for Youth Law, The Coalition for Juvenile Justice, The American Humane Association, and The Constitutional Project (a bipartisan nonprofit organization that seeks consensus on controversial legal and constitutional issues).

Additional groups of faith also have issued statements in opposition to the death penalty, including: American Baptist Churches in the USA, American Ethical Union, American Friends Service Committee, American Jewish Committee, Amnesty International, The Bruderhof Communities, Central Conference of America, Christian Church (Disciples of Christ), Church of the Brethren, Church Women United, The Episcopal Church, Evangelical Lutheran Church in America, Fellowship of Reconciliation, Friends Committee on National Legislation, Friends United Meeting, General Conference of General Baptists, General Conference Mennonite Church, The Mennonite Church, The Moravian Church in America, YMCA of the USA, Mormans for Equality and Social Justice, The Orthodox Church in America, National Council of the Churches of Christ, Presbyterian Church (USA), The Rabbinical Assembly, Reorganized Church of Jesus Christ of Latter Day Saints, Reformed Church in America, Unitarian Universalist Association, Union of American Hebrew Congregations, United Methodist Church, United Church of Christ, and United States Catholic Conference.[17] A recent poll found that only thirty-four percent of Missourians support the death penalty for juveniles.[18]

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[17]These groups have set out their views on a web site that can be found at www.deathpenalty religious.org/education.

[18]Juvenile Offender Public Opinion Survey, Center for Advanced Social Research, University of Missouri-Columbia (Mar. 2003), *available at* http://www.abanet.org/crim-just/juvjus/mopoll.pdf.

While ***Stanford*** found the opposition of social, professional, and religious groups to be of little importance, the Court's more recent decision in ***Atkins*** clearly demonstrated a shift back to reliance on such evidence to confirm the national consensus that evolving standards of decency proscribe imposition of the death penalty on the mentally retarded. ***Atkins*, 536 U.S. at 316 n.21**.

Similarly, here, although by no means dispositive, we find the opposition to the juvenile death penalty of the wide array of groups within the United States listed above to be consistent with the legislative and other evidence that current standards of decency do not permit the imposition of the death penalty on juveniles. We also find of note that the views of the international community have consistently grown in opposition to the death penalty for juveniles. Article 37(a) of the United Nations Convention on the Rights of the Child and several other international treaties and agreements expressly prohibit the practice. **Streib, *supra*, at 7**. According to Amnesty International, officially sanctioned executions of juveniles have occurred in only two other countries in the world in the last few years, Iran and The Republic of the Congo (DRC). **Amnesty International, *Juveniles: The Death Penalty Gives up on Juvenile Offenders*** (July 28, 2003), *at* **http://www.amnestyusa.org/abolish/juveniles**. Of the last seven juvenile offender executions, five occurred in the United States. **Streib, *supra*, at 7**.

4. Independent Examination of Death Penalty. Atkins also undertook an independent analysis of whether the death penalty was warranted for mentally retarded offenders by examining whether the social purposes intended to be served by the death penalty, retribution and deterrence, applied to mentally retarded offenders. ***Atkins*, 536 U.S. at 318-19**. The Supreme Court found that neither purpose would be furthered by executing the mentally retarded, as such individuals are

inherently less culpable than other actors and less able to deliberate about their actions and, thus, are less able to be deterred by awareness that their crime could result in death. ***Id.* at 319-21**. Further, ***Atkins*** found that it was necessary to categorically exclude the mentally retarded from execution, rather than allowing their mental capacity to be considered on a case-by-case basis, because their reduced mental capacity would increase the possibility of false confessions and reduce their ability to show mitigation or assist counsel, so that "[m]entally retarded defendants in the aggregate face a special risk of wrongful execution." ***Id.* at 321.** Lastly, it concluded: "As *Penry* demonstrated . . . reliance on mental retardation as a migrating factor can be a two-edged sword that may enhance the likelihood that the aggravating factor of future dangerousness will be found by the jury." ***Id.***

Similarly, as to juveniles, neither retribution nor deterrence provides an effective rationale for the imposition of the juvenile death penalty, and the risk of wrongful execution of juveniles is enhanced for reasons similar to that set out in ***Atkins*** in regard to the mentally retarded. While the parties have cited this Court to numerous current studies and scientific articles about the structure of the human mind, the continuing growth of those portions of the mind that control maturity and decision-making during adolescence and young adulthood, and the lesser ability of teenagers to reason, this Court need not look so far afield. The Supreme Court recognized the lesser culpability and developing nature of the adolescent mind in its 1988 decision in ***Thompson*, 487 U.S. at 835**, in which it stated, "there is also broad agreement on the proposition that adolescents as a class are less mature and responsible than adults," ***id*, at 834**, and therefore "less culpability should attach to a crime committed by a juvenile than to a comparable crime committed by an adult." ***Id.* at 835. *Thompson*** noted that it was not the first time that the Court had been called upon to recognize the lesser culpability of the young, for in ***Eddings* v.**

***Oklahoma*, 455 U.S. 104, 115-16 (1982)**:

> We stressed this difference in explaining the importance of treating the defendant's youth as a mitigating factor in capital cases: "But youth is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage. Our history is replete with laws and judicial recognition that minors, especially in their earlier years, generally are less mature and responsible than adults. Particularly 'during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment' expected of adults . . . ."

Thompson*, 487 U.S. at 834.** ***Thompson then stated:

> Thus, the Court has already endorsed the proposition that less culpability should attach to a crime committed by a juvenile than to a comparable crime committed by an adult. The basis for this conclusion is too obvious to require extended explanation. Inexperience, less education, and less intelligence make the teenager less able to evaluate the consequences of his or her conduct while at the same time he or she is much more apt to be motivated by mere emotion or peer pressure than is an adult.

Id.* at 835** (footnotes omitted). ***Thompson concluded, "The reasons why juveniles are not trusted with the privileges and responsibilities of an adult also explain why their irresponsible conduct is not as morally reprehensible as that of an adult." ***Id.*** Although Mr. Simmons is 17 rather than 15, he is still an adolescent, and this Court finds the rationales set forth in

Thompson and ***Eddings*** apply here.[19]

Similarly, the deterrence function of the death penalty can have little application to juveniles, not just because of their lesser ability to reason and their lack of informed judgment, but because, as discussed *supra*, the imposition of the death penalty on 16-year-olds and 17-year-olds has become so unusual in the last decade that "the likelihood that the teenage offender has made the kind of cost-benefit analysis that attaches any weight to the possibility of execution is so remote as to be virtually non-existent." ***Thompson*, 487 U.S. at 837** (discussing effect of infrequency of executions of those 15 and younger).

Finally, as Mr. Simmons notes, the risk of wrongful execution also is greater as to younger offenders, who have had less time to develop ties to the community, less time to perform mitigating good works, and less time to develop a stable work history, than is true of adult offenders, and who are far more likely than adults to waive their rights and to give false confessions. Moreover, although nominally under Missouri law defendants are permitted to use their youth as a mitigating factor, this case provides a graphic illustration of the fact that their youth can become a further argument against them. In closing argument in Mr. Simmons' case, the state argued that the jury should not let him use his age to protect himself because if it did so, then he "wins." The state then argued, "Think about age. Seventeen years old. Isn't that scary. Doesn't that scare you? Mitigating? Quite the contrary I submit. Quite the contrary." Thus, Mr. Simmons' youth was used to suggest greater immorality and future dangerousness and so to provide a further reason to impose the death penalty.

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[19] ***Stanford*** did not find these rationales inapplicable to those 16 or 17 at the time of their crime, but instead found these issues irrelevant.

For these reasons, this Court concludes that the Supreme Court of the United States would hold that the execution of persons for crimes committed when they were under 18 years of age violated the "evolving standards of decency that mark the progress of a maturing society," and is prohibited by the Eighth Amendment to the United States Constitution as applied to the states through the Fourteenth Amendment.[20]

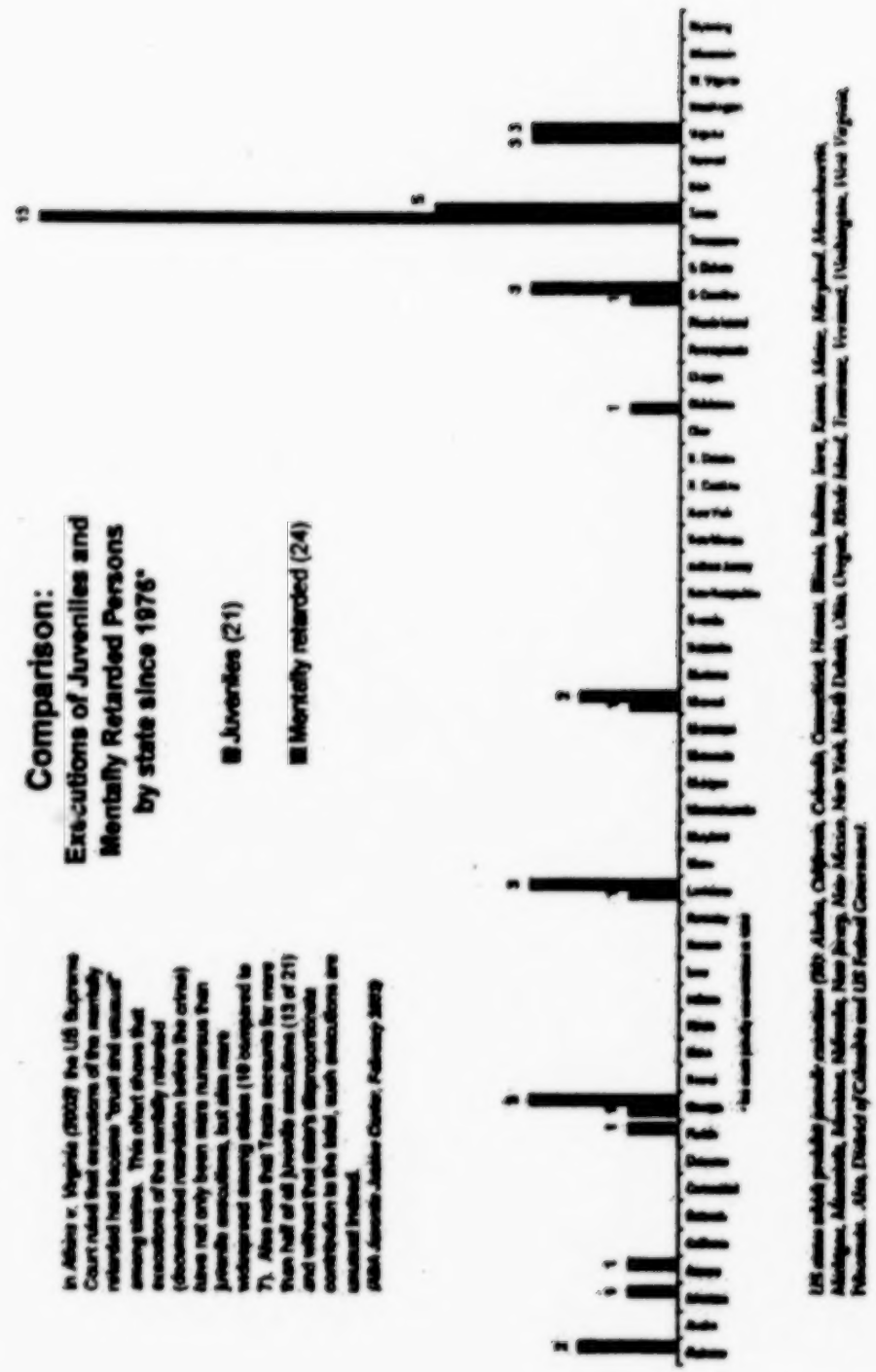
IV. CONCLUSION

For the reasons set out above, this Court sets aside Mr. Simmons' death sentence and re-sentences him, pursuant to the Court's authority under Sec. 565.035 RSMo 2000, to life imprisonment without eligibility for probation, parole, or release except by act of the Governor.

Laura Denvir Stith, Judge

White, C.J., Wolff and Teitelman, JJ., concur;
Wolff, J., also files separate concurring opinion;
Price, J., dissents in separate opinion filed; Benton and Limbaugh, JJ., concur in opinion of Price, J.

[20]Because the Eighth and Fourteenth Amendments afford Mr. Simmons relief, this Court need not reach Mr. Simmons alternative argument that, even if his execution is not barred by the Eighth Amendment, it is barred by article 1, section 21 of the Missouri Constitution.



SUPREME COURT OF MISSOURI

en banc

State ex rel. Christopher Simmons,	)	
Petitioner,	)	
vs.	)	**No. SC84454**
Donald P. Roper, Superintendent, Potosi Correctional Center,	)	
Respondent.	)	

CONCURRING OPINION

I concur in the principal opinion and in its holding that the Eighth Amendment's prohibition of cruel and unusual punishments bars the execution of those who were younger than 18 when their crimes were committed.

Both the principal opinion and the dissent strive earnestly to follow relevant precedent of the United States Supreme Court - whether that be the line of reasoning in *Atkins v. Virginia*, 536 U.S. 304 (2002), or the result in *Stanford v. Kentucky*, 492 U.S. 361 (1989). That Court's views may be as divided as this Court's. The underlying premise of both views is that the constitution forbids the execution of a person who, at the time of the crime, was not fully capable of the kind of adult moral judgment that would hold the offender subject to the death penalty for his crime.

The use of chronological age in making these judgments

- as the Court did in *Stanford* and in *Thompson v. Oklahoma*, 487 U.S. 815 (1988) - invites the drawing of a bright line as to the age at which a murder defendant may be subject to the death penalty.

The legislature has drawn the line for eligibility for the death penalty at age 15. Section 565.020.2.[1] The age-15 standard is consistent with *Thompson v. Oklahoma*, which held that a child who committed a crime when he was 15 or younger cannot receive the death penalty because of the Eighth Amendment's proscription of cruel and unusual punishments. Citing evolving standards, the principal opinion here holds that the line is now drawn at age 18.[2]

What is the nature of this judicial or legislative judgment? When any given age is used, it reflects a judgment that those below that age cannot be fully responsible in terms of being subject to the death penalty. The line is drawn because of the judgment that most if not all persons of such a youthful age are not morally capable of being fully responsible for their acts. This is true even though a child less than 18 may be tried as an

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[1]All references are to RSMo 2000 unless otherwise indicated. Section 565.020.2 provides that the death penalty may not be applied where the defendant "has not reached his sixteenth birthday at the time of the commission of the crime."

[2]In *Brennan v. State*, 754 So.2d 1 (Fla. 1999), where the Florida Supreme Court held that 16-year-old defendants may not be subjected to the death penalty, Judge Anstead, specially concurring, wrote, "[s]omeone must draw these important lines, and in our unique framework of sharing governmental powers, this function of constitutional line-drawing has been assigned to the judicial branch." *Id.* at 12 n.15 (citing *Thompson v. Ok.*, 487 U.S. 815, 840 (1988)). Judge Anstead was aware of the arbitrariness that could result from such line drawing: "inevitably, there will be cases where one day's difference in age will be the determinative factor between life and death." *Id.*

adult, found guilty, and receive an adult non-capital sentence. *See* section 211.071.

The legislature traditionally has drawn lines by chronological age based on assumptions or experience as to maturity.[3] There is some judicial authority for deferring to the legislature in this regard even as to capital punishment of those of a certain age, *see Thompson v. Oklahoma*, 487 U.S. at 854 (1988) (O'Connor, J., concurring) ("I would not substitute our inevitably subjective judgment about the best age at which to draw a line in the capital punishment context for the judgments of the Nation's legislatures."). The *Thompson* decision itself, however, stands for the proposition that line drawing in capital cases is a prerogative of the judicial in its role of safeguarding Eighth Amendment rights.

Judges have long drawn lines by chronological age. The common law - judge-made law - has had a rich, if somewhat checkered history of recognizing age categories when it comes to criminal responsibility. Under the common law, a child who reached the age of 14 was fully responsible for crimes as an adult. Under the age of seven the common law determined that a person had no criminal capacity. Between the ages of seven and 14, there was a rebuttable presumption that the child lacked capacity to be criminally responsible for the child's acts. The common law placed the burden on the prosecution to rebut the presumption of incapacity. ROLLIN M. PERKINS, CRIMINAL LAW 837 (2d ed. 1969).

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[3] *See* section 311.325 (setting the minimum drinking age at 21); section 115.133 (setting the minimum voting age at 18); section 431.061 (consent to surgical or medical treatment); section 431.056 (minors' capacity to enter into contracts); section 451.090 (minors' capacity to enter into marriage contract); section 302.060 (age one can obtain a driving license); section 474.310 (must be 18 to make a will); and section 494.425 (must be 21 to serve on a jury).

The common law, as Perkins has noted, has some grim examples: In the 13th century, a seven-year-old boy was tried for murder; his execution was "pardoned for the king's sake." *Id.* at 838. English records also show that a 13-year-old girl was executed for killing her mistress, a 10-year-old boy was executed for killing a companion, and an eight-year-old boy was similarly punished for "maliciously" burning some barns. *Id.* Perkins also notes that American records show the execution of two 12-year-old boys for murder. *Id.* The standards of decency, cited by the United States Supreme Court and by the principal opinion in this case, seem certainly to have evolved. *Atkins v. Virginia*, 536 U.S. 304 (2002). But evolved how far?

Missouri's death penalty statute states that the jury, in determining whether or not to recommend the death penalty, can consider "age," but without elaborating how age is to be considered. Section 565.032.3(7). Despite the lack of elaboration in the statute, the jury is instructed to consider age as a mitigating factor. In this case, in the penalty phase final argument, the defense and the prosecution used Simmons' age in their arguments. In mitigation, the defense talked about 17-year-olds and their inability to think about the future, and about the fact that a person of 17 cannot vote or lawfully drink alcohol, but can be subject to the death penalty. The prosecutor used Simmons' age to argue that he should be put to death. The prosecutor's argument was: "Think about age. Seventeen years old. Isn't that scary? Doesn't that scare you? Mitigating? Quite the contrary I submit. Quite the contrary." The prosecutor seems to have implied that if Simmons was this bad at 17, he could only get worse.

The principal opinion draws a bright line based on the Eighth Amendment's prohibition of cruel and unusual punishments. However, if the Supreme Court of the United States does not agree with this Court's conclusion that the

standard of decency has evolved to that point, the issue is certainly appropriate for a factual determination on a case-by-case basis. In that event, this Court may wish to take a cue from the statute's reference to age and borrow the "presumption" concept from the common law.

An updated version would be: A 16 or 17-year-old is presumed not to have the capacity to be fully responsible and, therefore, eligible for the death penalty. In the penalty phase, the state could present evidence of the youthful defendant's full capacity, with the defense entitled to present evidence that the defendant was not fully responsible at the time of the crime so as to be eligible for the death penalty.[4] The state would have the burden of overcoming the presumption. The issue of responsibility, in the sense of eligibility for the death penalty, would become the subject of a jury finding, rather than a line drawn by the Court.

Using age as a bright line in juvenile death penalty cases involving 16 and 17 year-olds may be considered unreliable because age, standing alone, is not the true relevant factor as to why it is arguably unjust to impose the death penalty. "Rather, age is simply a 'proxy' for a combination of factors such as maturity, judgment, responsibility, and the capability to assess

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[4]Courts often make decisions regarding the capacity of juveniles. For example, in certifying a juvenile to be tried as an adult, the youth's age, maturity and sophistication are considered. *State v. Thomas*, 70 S.W.3d 496, 501 (Mo. App. 2002); section 211.071.6. In *Thomas*, to evaluate whether the defendant, who was 16 at the time of the crime, should be tried as an adult, the chief juvenile officer prepared a report providing that the defendant "'appears to be of low average intelligence, responsive, . . . mature. . . appears to know the difference between right and wrong. . . appears to be sophisticated in his manner of living in that he makes his own decision.'" *Id.* To determine whether the defendant's capacity warrants the death penalty, evaluations similar to that performed for certification could be used.

the possible consequences of one's conduct." Joseph L. Hoffmann, "On the Perils of Line Drawing: Juveniles and the Death Penalty," 40 HASTINGS L.J. 229, 258 (1989). Because age does not correspond perfectly to the combination of relevant factors, its use as a bright line produces "comparative injustice" - that is, some may be spared who are fully capable of receiving the death penalty and others executed who should have been found incapable.

The alternative is the adoption of presumptions with respect to the age of the murderer in capital cases.[5] In a case such as this one, where the defendant was a 17-year-old murderer, the Court could hold that persons below the age of 18 are presumed to lack sufficient maturity to be eligible for the death penalty. This presumption would be subject to rebuttal by the state, in which case the unusually mature 17-year-old murderer could receive the death penalty. Proof of such capacity should be beyond a reasonable doubt.[6]

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[5]The dissenters in *Thompson v. Oklahoma* also may well have been open to individualized consideration when deciding whether to subject juvenile offenders to the death penalty. Justice Scalia wrote at the beginning of his dissenting opinion that, "[i]f the issue before us today were whether an automatic death penalty for conviction of certain crimes could be extended to individuals younger than 16 when they commit the crimes, thereby preventing individualized consideration of their maturity and moral responsibility, I would accept the plurality's conclusion that such a practice is opposed by national consensus . . . . I might even agree with the plurality's conclusion if the question were whether a person under 16 when he commits a crime can be deprived of the benefit of a rebuttable presumption that he is not mature and responsible enough to be punished as an adult." 487 U.S. 815, 859.

[6]It can be argued that the statutory line that bars execution of offenders who were under age 16 at the time of their offenses contains a presumption that those age 16 and above are eligible from the death penalty. The statutory reference to age, and the jury instruction that age be considered a mitigating factor, would place the burden on the young offender to rebut

Individualized treatment in juvenile death penalty cases would preserve the capital sentencing option while eliminating or diminishing the comparative injustice problem associated with line-drawing governed solely according to a defendant's age.

If the Supreme Court of the United States does not agree that age 18 is where the line now should be drawn, the presumption suggested here should be adopted. This would not be based on the Eighth Amendment's ban on cruel and unusual punishments, but rather a state-law interpretation of the statute that makes "age" a factor in capital sentencing.[7]

Requiring a specific jury finding on the youthful murderer's capacity would be consistent with this Court's overall duty to ensure that a person lacking full capacity at the time

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the statute's supposed presumption. However, establishing presumptions and burdens is traditionally a judicial function, though not exclusively so. In cases involving the death penalty, the judiciary's prerogative to establish presumptions and to assign the burdens of overcoming presumptions is a necessary part of the courts' duty to ensure that the death penalty is not wrongly imposed.

[7]Come to that, the presumption logically could be applied to those under 21. That is, after all, the age at which the legislature deems a person to be mature enough to pass judgment as a juror. Section 494.425. *But see, Stanford v. Kentucky*, 492 U.S. at 374-377. However, the presumption against the death penalty seems better suited for those ages 16 and 17 than for those over age 18. The justification for the presumption is that the death penalty is not appropriate for most persons of a certain age and, thus, the state should have the burden of showing that the less probable case - that the particular offender is mature enough to be subject to the death penalty - is true. If most but not all of those over age 18 are suitable for the death penalty, then a defendant may appropriately have the burden of showing that, in his case, age is a sufficiently mitigating circumstance to avoid the death penalty.

of the crime not be subject to the death penalty.[8]

This alternative should be used only if the Eighth Amendment's prohibition of cruel and unusual punishments is held not to bar execution of those who were younger than 18 when they committed their crimes. Because I believe the constitution does bar such executions, I concur in the principal opinion.

Michael A. Wolff, Judge

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[8]Another statutory basis for holding persons under the age of 18 ineligible for the death penalty may be found in the duty of this Court to ensure proportionality under section 565.035.3(3) RSMo. 2000. This section requires this Court to determine whether "the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime, the strength of the evidence and *the defendant*." (emphasis added) As the principle opinion's historical analysis demonstrates, in the last decade the death penalty has rarely been imposed on persons under the age of 18. If the sentence of death for a murderer who is less than 18 years old is compared to other sentences of murderers who were the same age, the likelihood of an under-18 murderer receiving the death penalty approaches the likelihood of being struck by lightning. The death penalty for under-18 offenders would appear to be disproportionate.

SUPREME COURT OF MISSOURI

en banc

State ex rel. Christopher Simmons,	)
Petitioner,	)
vs.	)**No. SC84454**
Donald P. Roper, Superintendent, Potosi Correctional Center,	)
Respondent.	)

DISSENTING OPINION

I.

I respectfully dissent.

Our constitutional form of government allows for the will of the people to be expressed, for better or worse, through the laws enacted by their elected representatives. The role of the courts is merely to interpret such statutes and to rule upon their constitutionality, if necessary.

Missouri has enacted section 565.020.2, RSMo, providing that individuals over the age of sixteen, who knowingly cause the death of another after deliberation may be subjected to the death penalty. Although this statute is subject to serious controversy, it is the enacted will of the people of Missouri and must be enforced unless it is in violation of either the Missouri or the United States Constitutions.

The majority opinion of this Court holds that section 565.020.2 violates the United States Constitution. This opinion is directly in conflict with the United States Supreme Court decision of *Stanford v. Kentucky*, 492 U.S. 361 (1989), consolidated with *Wilkens v. Missouri*, No. 87-6026, which specifically states:

> We discern neither a historical nor a modern societal consensus forbidding the imposition of capital punishment on any person who murders at 16 or 17 years of age. Accordingly, we conclude that such punishment does not offend the Eighth Amendment's prohibition against cruel and unusual punishment.
>
> The judgments of the Supreme Court of Kentucky and the Supreme Court of Missouri are therefore affirmed.

492 U.S. at 380.

The United States Supreme Court has not overruled *Stanford*, even in light of its decision in *Atkins v. Virginia*, 122 S.Ct. 2242 (2002), nor after recent consideration of the precise arguments relied upon by the majority of this Court, *see Mullin v. Hain*, 538 U.S. ___, 123 S.Ct. 1654 (2003) (mem.) (order granting application to vacate the stay of execution of defendant who was seventeen years old when he committed murder); *In re Stanford*, 537 U.S. ___, 123 S.Ct. 472 (2002) (denying writ of *habeas corpus* of petitioner who was seventeen years when he committed murder); *Patterson v. Texas*, 536 U.S. ___, 123 S.Ct. 24 (2002) (denying writ of *habeas corpus* of petitioner who was seventeen years old when he committed murder). It is the United States Supreme Court's prerogative, and its alone, to

overrule one of its decisions. *United States v. Hatter*, 532 U.S. 557, 567 (2001); *Hohn v. United States*, 524 U.S. 236, 252-53 (1998); *State Oil Co. v. Kahn*, 522 U.S. 3, 20 (1997); *Rodriguez de Quinas v. Shearson/American Express, Inc.*, 492 U.S. 477, 484 (1989).

This Court is bound by the United States Supreme Court's decision in *Stanford v. Kentucky* and simply has no authority to overrule that decision.

II.

Petitioner, Christopher Simmons, was born on April 26, 1976. On September 10, 1993, when he was approximately seventeen-years and five-months old, petitioner was arrested for the murder of Shirley Crook. Following a botched robbery attempt, petitioner kidnapped Ms. Crook, bound and gagged her. Petitioner walked Ms. Crook down a railroad trestle, bound her more, and pushed her, while still alive, over the trestle and into the Meramec River. Prior to the robbery, petitioner stated to his accomplice that they could commit a robbery and murder and get away with it because they were juveniles.

Petitioner now asks this court for *habeas corpus* relief, alleging that his death sentence is illegal because he was a juvenile at the time of his crime. Petitioner acknowledges that *Stanford v. Kentucky*, 492 U.S. 361 (1989), explicitly held that the United States Constitution was not violated by the execution of a sixteen or seventeen-year-old defendant. However, petitioner alleges that the United States Supreme Court's recent decision, *Atkins v. Virginia*, 122 S.Ct. 2242 (2002), "***implicitly*** overrules the controlling precedent of *Stanford* . . . ." (emphasis added).

Stanford specifically addressed Missouri's capital punishment statute in determining that there was "neither a historical nor a modern societal consensus forbidding the imposition of capital punishment on any person who murders at 16 or 17 years of age" and "such punishment does not offend the Eighth Amendment's prohibition against cruel and unusual punishment." *Stanford*, 492 U.S. at 366, 380. *Stanford* noted its petitioner's failed to establish a societal "consensus against capital punishment for 16 and 17-year-old offenders through state and federal statutes and the behavior of prosecutors and juries . . . . " *Id.* at 377. The Supreme Court explicitly refused to consider "other indicia, including public opinion polls, the views of interest groups, and the positions adopted by various professional associations." *Id.* "A revised national consensus so broad, so clear, and so enduring as to justify a permanent prohibition upon all units of democratic government must appear in the operative acts (laws and the application of laws) that the people have approved." *Id.*

The United States Supreme Court did not overrule *Stanford* in *Atkins v. Virginia*, 122 S.Ct. 2242 (2002). *Atkins* did not deal with juveniles, but address capital punishment of mentally retarded persons. *Id.* at 2244. The Court held that capital punishment of the mentally retarded was cruel and unusual for two reasons: 1) mentally retarded persons "do not act with the level of moral culpability that characterizes the most serious adult criminal conduct," *Id.*; and 2) the prevailing standards of decency reflected by objective standards such as legislatures, experts, and the public establish a consensus against imposing capital punishment upon the mentally retarded. *Id.*

United States Supreme Court decisions interpreting the Constitution are the supreme law of the land. *Cooper v. Aaron*,

358 U.S. 1, 18 (1958).[1] "State court judges in Missouri are bound by the 'supreme law of the land,' as declared by the Supreme Court of the United States (Art. VI, Constitution of the United States)." *Kraus v. Bd. of Educ.*, 492 S.W.2d 783, 784 (Mo. 1973). *See also Rodgers v. Danforth*, 486 S.W.2d 258, 259 (Mo. banc 1972) (citing U.S. Const. art. VI; *Cooper*, 358 U.S. 1 (1958) (This court "is bound to follow the decisions of the Supreme Court of the United States.").

This Court's solemn duty to abide by decisions of the Supreme Court of the United States is not abridged simply because we disagree with that Court's decision or even if it appears that a decision was clearly in error. Neither can this Court imply or anticipate the overruling of a decision of the United States Supreme Court.

In *State Oil Co. v. Kahn*, the court of appeals "characterized [the United States Supreme Court's previous decision] as 'unsound when decided' and 'inconsistent with later decisions' of [that] Court," but "felt constrained to follow that decision." 522 U.S. 3, 9 (1997) (citation omitted). The Supreme Court of the United States agreed with the appellate court's characterization of its previous opinion, but applauded the court of appeals for respecting the doctrine of *stare decisis*. *Id.* at 20.

> Despite what Chief Judge Posner aptly described as *Albrecht's* "infirmities, [and] its increasingly wobbly, motheaten foundations," there remains the question whether *Albrecht*

[1] "[T]he interpretation of [the Constitution] enunciated by this Court in [its decision] is the supreme law of the land, and Art. VI of the Constitution makes it of binding effect on the States 'any Thing in the Constitution or Laws of any State to the contrary notwithstanding.'" *Cooper*, 358 U.S. at 18.

> deserves continuing respect under the doctrine of *stare decisis*. The Court of Appeals was correct in applying that principle despite disagreement with *Albrecht*, for it is this Court's prerogative alone to overrule one of its precedents.

Id. (internal citation omitted).

Similarly, *Rodriquez de Quinas v. Shearson/American Express, Inc.* noted a shift away from "the old judicial hostility to arbitration." 490 U.S. 477, 480 (1989). That view had "been steadily eroded over the years" and the Court itself took notice of the shift in a prior opinion. *Id.* at 480-81. However, the Supreme Court "did not suggest that the Court of Appeals on its own authority should have taken the step of renouncing" the Court's prior decision. *Id.* at 484.

> If a precedent of [the Supreme Court of the United States] has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals [or other court] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.

Id.

The Supreme Court of the United States has not chosen to exercise its prerogative of overruling *Stanford v. Kentucky*, despite several very recent opportunities to do so. *See Mullin v. Hain*, 538 U.S. ___, 123 S.Ct. 1654 (2003) (mem. order); *In re Stanford*, 537 U.S. ___, 123 S.Ct. 472 (2002); *Patterson v. Texas*, 536 U.S. ___, 123 S.Ct. 24 (2002). In each case, the defendant was seventeen-years-old when he committed the

crime for which he was sentenced to death. The Supreme Court refused to reexamine *Stanford v. Kentucky* despite vigorous dissents raising precisely the same arguments as presented to this Court.

While the majority of this Court might believe that *Stanford v. Kentucky* has been abandoned in light of *Atkins* and in light of their perception of a national consensus regarding capital punishment of juvenile offenders, their belief and perception are not sufficient to preempt the Supreme Court of the United States concerning its existing precedent.

It is the prerogative of the Supreme Court of the United States, and its alone, to overrule one of its decisions.

The proper venue for Simmons to seek relief on this issue is the Supreme Court of the United States. I would deny the writ.

_____

William Ray Price, Jr., Judge

No. SC84454
In the Supreme Court of Missouri

May Session, 2003

State ex rel. Christopher Simmons,
Petitioner,

v. HABEAS CORPUS

Donald P. Roper, Superintendent,
Potosi Correctional Center,
Respondent.

Now at this day come again the parties aforesaid, by their respective attorneys, and the Court here now being sufficiently advised of and concerning the premises doth consider and adjudge that the Petitioner is discharged to the custody of the superintendent of the Potosi Correctional Center and that Petitioner's death sentence is set aside and Petitioner is resentenced to life imprisonment without eligibility for probation, parole or release except by act of the Governor all in conformity with the opinion of this Court herein delivered.

(Opinion filed.)

STATE OF MISSOURI-Sct.

I, THOMAS F. SIMON, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the May Session thereof, 2003, and on the 26th day of August 2003, in the above entitled cause.

Given under my hand and seal

of said Court, at the City of Jefferson, this 26th day of August 2003.

\s\ _____

Clerk

\s\ _____

D.C.

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(6)

Supreme Court, U.S.
FILED
APR 20 2004
OFFICE OF THE CLERK

No. 03-633
(CAPITAL CASE)

In the
SUPREME COURT OF THE UNITED STATES

DONALD P. ROPER,
Superintendent, Potosi Correctional Center,
Petitioner,

v.

CHRISTOPHER SIMMONS,
Respondent.

On Writ of Certiorari
to the Supreme Court of Missouri

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED FOR REVIEW
(Capital Case)

1. Once this Court holds that a particular punishment is not "cruel and unusual," and thus not barred by the Eighth and Fourteenth Amendments, can a lower court reach a contrary decision based on its own analysis of evolving standards?

2. Is the imposition of the death penalty on a person who commits a murder at age seventeen "cruel and unusual," and thus barred by the Eighth and Fourteenth Amendments?

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Catherine A. Crosby, et al., *The Juvenile Death Penalty and the Eighth Amendment*, 19 Law & Human Behavior 245 (1995) 40

Curtis A. Bradley & Jack L. Goldsmith, *Treaties, Human Rights and Conditional Consent*, 149 U. Pa. L. Rev. 399 (2000) 28

Joseph L. Hoffmann, *On the Perils of Line Drawing: Juveniles and the Death Penalty*, 40 Hastings L.J. 229 (1989) 33

The President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Juvenile Delinquency and Youth Crime (1967), at 119-20 33

The United Nations Convention on the Rights of the Child: A Guide to the "Travaux Preparatoires" 465 (Sharon Detrict, ed., 1992) 28

No. 03-633
(CAPITAL CASE)

In the
SUPREME COURT OF THE UNITED STATES

DONALD P. ROPER,
Superintendent, Potosi Correctional Center,
Petitioner,

v.

CHRISTOPHER SIMMONS,
Respondent.

On Writ of Certiorari
to the Supreme Court of Missouri

BRIEF FOR PETITIONER

OPINIONS BELOW

The August 26, 2003 decision of the Supreme Court of Missouri is reported at 112 S.W.3d 397 (Mo. banc 2003) and is published in the Joint Appendix ("App.") at A-107.

JURISDICTION

The judgment of the Missouri Supreme Court was entered on August 26, 2003. (App. at A-107, A-151). The petition for writ of certiorari was filed on October 24, 2003, and was granted on January 26, 2004. This court has jurisdiction under 28 U.S.C. § 1257(a) (2000).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States, Amendment VIII:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Constitution of the United States, Amendment XIV, § 1:

> [N]or shall any state deprive any person of life, liberty or property without due process of law .
> . . .

Mo. Rev. Stat. § 565.020 (1994):

> 1. A person commits the crime of murder in the first degree if he knowingly causes the death of another person after deliberation upon the matter.
>
> 2. Murder in the first degree is a class A felony, and the punishment shall be either death or imprisonment for life without eligibility for probation or parole, or release except by act of the governor; except that, if a person has not reached his sixteenth birthday at the time of the commission of the crime, the punishment shall be imprisonment for life without eligibility for probation or parole, or release except by act of the governor.

STATEMENT OF THE CASE

Respondent Christopher Simmons was convicted of a murder he committed while seventeen years of age. After his conviction was upheld, he sought a writ of habeas corpus from the Supreme Court of Missouri. That court granted the writ and resentenced Simmons to life imprisonment. In doing so, the court relied on the Eighth Amendment to the United States Constitution – despite contrary, binding precedent from this Court.

1. The Murder

The Missouri Supreme Court described the murder of Shirley Crook in its direct appeal opinion affirming Simmons's murder conviction and death sentence. (App. A-21 to A-25). In summary, those facts are as follows:

In early September 1993, Simmons, then age seventeen (now 28), discussed with his friends, Charlie Benjamin, fifteen, and John Tessmer, sixteen, the possibility of committing a burglary and murdering someone. On several occasions, Simmons described his planned crime: find someone to burglarize, tie the victim up, and ultimately push the victim off a bridge. Simmons assured his friends that their status as juveniles would allow them to "get away with it."

On September 8, 1993, Simmons arranged to meet Benjamin and Tessmer at around 2:00 a.m. to carry out Simmons's plan. The trio met at the home of Brian Moomey. When Simmons and Benjamin left to commit the burglary, Tessmer returned home.

Simmons and Benjamin found a window cracked open at the rear of Shirley Crook's home. They opened the window, reached through, unlocked the back door, and entered the house.

Simmons turned on a hallway light; the light awakened Mrs. Crook, who was home alone. She sat up in bed and asked, "Who's there?" Simmons entered her bedroom and recognized Mrs. Crook as a woman with whom he had previously had an automobile accident. Mrs. Crook apparently recognized Simmons as well.

Simmons ordered Mrs. Crook out of bed and, when she did not comply, Simmons forced her to the floor with Benjamin's help. While Benjamin guarded Mrs. Crook in the bedroom, Simmons found a roll of duct tape, returned to the bedroom, and bound her hands behind her back. The two also taped shut Mrs. Crook's eyes and mouth. They placed Mrs. Crook in the back of her minivan. Simmons drove the van from Mrs. Crook's home in Jefferson County to Castlewood State Park in St. Louis County.

Simmons parked the van near a railroad trestle that spanned the Meramec River. When he and Benjamin began to unload Mrs. Crook, they discovered that she had freed her hands and had removed some of the duct tape from her face. Using Mrs. Crook's purse strap, the belt from her bathrobe, a towel from the back of the minivan, and some electrical wire found on the trestle, Simmons and Benjamin bound Mrs. Crook again, restraining her hands and feet and covering her head with a towel. Simmons and Benjamin walked Mrs. Crook to the railroad trestle. There, Simmons bound her hands and feet together, hog-tied fashion, with the electrical cable, and covered her face completely with duct tape. Simmons then pushed her off the railroad trestle into the river below. At the time she fell, Mrs. Crook was alive and conscious. Simmons and Benjamin threw Mrs. Crook's purse into the woods and drove the van back to the mobile home park across from the subdivision in which Mrs. Crook lived.

Later that day, Simmons returned to Moomey's home

and bragged that he had killed a woman "because the bitch seen my face." Meanwhile, Mrs. Crook's husband Steven returned home from an overnight trip and discovered that she had not gone to work as scheduled. When he did not hear from her by that evening, he filed a missing person's report.

That same afternoon, two fishermen found Mrs. Crook's body floating in the Meramec River, three quarters of a mile downstream from the railroad trestle. The fishermen notified authorities, who removed the body. The medical examiner identified the body, determined the cause of death as drowning, and noted that the victim was alive before being pushed from the bridge. The examiner also reported that Mrs. Crook had sustained several fractured ribs and considerable bruising, injuries that did not result from her fall from the railroad trestle.

The next day, September 10, police learned that Simmons was involved in the murder. They arrested Simmons and took him to the Fenton Police Department. Police read Simmons the warnings required by *Miranda v. Arizona*, 384 U.S. 436 (1966). Simmons waived his constitutional right to counsel and confessed to the murder. He also agreed to videotape a confession and to take part in a videotaped "reenactment" of the murder at the crime scene.

2. The Trial, Post-conviction Proceedings, Appeals, and Federal Habeas

At trial,[1] the jury found Simmons guilty of first degree murder and recommended a sentence of death. The jury found three statutory aggravating circumstances in the murder of Shirley Crook: (1) it was committed for the purpose of receiving money or any other thing of value; (2) it was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest of Simmons; and (3) it involved depravity of mind, and as a result, the murder was outrageously and wantonly vile, horrible, and inhuman. (App. A-18). Following the jury's recommendation, the trial court sentenced Simmons to death.

Simmons filed a motion for post-conviction relief under Missouri Supreme Court Rule 29.15. After an evidentiary hearing, the circuit court denied the motion.

Simmons took a consolidated appeal to the Supreme Court of Missouri. That court affirmed Simmons's conviction and sentence and affirmed the denial of post-conviction relief. *State v. Simmons*, 944 S.W.2d 165 (Mo. banc 1997). This Court denied review. *Simmons v. Missouri*, 522 U.S. 953 (1997).

Simmons filed a petition for writ of habeas corpus under 28 U.S.C. § 2254 (2000) in the United States District Court for the Eastern District of Missouri. That court denied the petition.

---

[1] **The trial was not held in juvenile court because Simmons was not a "juvenile" under Missouri law. (*See* App. A-109 n.2). For a Missouri juvenile court to have jurisdiction, the offender must be sixteen or younger at the time of the offense. Mo. Rev. Stat. § 211.031.1 (2000) (jurisdiction of juvenile court), § 211.021(1), (2) (2000) (defining "adult" and "child").**

Simmons v. Bowersox, No. 4:97-CV-2415 JCH (E.D. Mo. Aug. 5, 1999). The United States Court of Appeals for the Eighth Circuit affirmed the denial. *Simmons v. Bowersox*, 235 F.3d 1124 (8th Cir. 2001). This Court denied review. *Simmons v. Luebbers*, 534 U.S. 924 (2001).

3. State Habeas

The present litigation began on May 3, 2002, when Simmons filed a petition for writ of habeas corpus with the Supreme Court of Missouri under that court's Rules 91.01(b) and 91.02(b). After receiving memoranda from Simmons and the State, the court issued a writ of habeas corpus. The State then filed a return.

On August 26, 2003, the court set aside Simmons's death sentence and resentenced him to life imprisonment without eligibility for probation, parole, or relief except by act of the Governor. According to the Missouri court, Simmons's Eighth Amendment rights were violated by his capital sentence because he was seventeen when he murdered Mrs. Crook. Writing for the dissent, Judge Price found the issue controlled by this Court's decision in *Stanford v. Kentucky*, 492 U.S. 361 (1989).

SUMMARY OF THE ARGUMENT

The people in many states have chosen, through their legislatures, to make capital punishment available to prosecutors and juries when they find persons guilty of committing heinous crimes at age seventeen. This Court affirmed that choice in *Stanford v. Kentucky*, 492 U.S. 361 (1989). Even without the existence of *Stanford*, respondent Simmons would bear the "heavy burden [that] rests on those who would attack the judgment of the representatives of the people." *Gregg v. Georgia*, 428 U.S. 153, 175 (1976). Because of *Stanford*, Simmons bears the additional burden of justifying abandonment of the principle of stare decisis.

But the most important question here goes to the impact this Court's precedents have on lower courts. The Supreme Court of Missouri assumed authority to effectively overrule this Court's interpretation of the Constitution in *Stanford* in favor of its own. That is wrong. Even though Simmons's argument invoked the Eighth Amendment, with its evolving standards, it is for this Court, and not lower courts, to declare whether a particular punishment – here, capital sentences for those who commit heinous murders while seventeen years old – has become "cruel and unusual" and is thus newly barred by the Eighth Amendment. The Missouri court's action trivialized this Court's power and the command of its precedent.

Moreover, the Court should not abandon *Stanford*. States, prosecutors, and juries have relied on that precedent for the last fifteen years. The Missouri court did not find that any of the traditional bases for departing from stare decisis existed. Instead, it concluded that societal standards have evolved to the point that *Stanford* is no longer good law. That conclusion is incorrect.

This Court has consistently and appropriately refused to

declare a particular punishment "cruel and unusual" unless and until there is a national consensus to that effect. To determine whether there is a consensus, the Court looks at the objective record in two areas: legislative action and jury verdicts.

In *Stanford*, the Court concluded that legislative acts did not demonstrate a consensus against capital punishment for those who commit crimes at age sixteen. Since *Stanford*, a few state legislatures have raised the minimum age from sixteen to eighteen. But most have retained the age limit affirmed in *Stanford*; the picture has not appreciably changed. The Missouri court found otherwise, but to do so it had to include in its total one state where a court, not the legislature, raised the age, and two states that did not change the age at all, but merely rejoined the capital punishment states without modifying age distinctions they had previously made in non-capital sentencing. Meanwhile, other states reaffirmed, legislatively, the sixteen-year-old age limit. And voters in other States that had placed the line at eighteen chose to make capital punishment available to younger criminals. Meanwhile, the United States Senate, working with the president, preserved the ability of the States to make those choices. Those legislative acts confirm that the consensus the Court looked for in *Stanford* still does not exist.

Jury verdicts confirm that result. Capital sentences and executions of those who commit crimes before age eighteen are more common today than they were when the Court decided *Stanford*.

Although this Court has focused on the objective evidence of consensus in those two areas, it has also addressed other considerations. But these, too, show no appreciable change since *Stanford*. Capital punishment serves societal interests today just as it did in 1989. Polling data leads to the ambiguous conclusion that many oppose capital punishment for juveniles in the abstract, but they support it when faced with

specific cases. Some self-appointed expert groups opine that the practice should be barred, but they do not speak with the authority of a legislature and their opinions do not establish a national consensus. And though foreign countries that have capital punishment may have chosen a higher minimum age, the question here is whether there is an American consensus that a particular age is mandated by the United States Constitution.

If there is an American consensus today, it is a consensus that the States should be allowed to preserve capital punishment for use in the extraordinary case where a seventeen-year-old commits a particularly heinous crime.

ARGUMENT

I.

Lower courts should be bound by this Court's Eighth Amendment precedents, not set free to create a patchwork of differing constitutional rules, reflecting their own changing and subjective views of what constitutes "cruel and unusual punishment."

Decisions of this Court interpreting the Constitution are, of course, the supreme law of the land. U.S. Const. Art. VI; *Cooper v. Aaron*, 358 U.S. 1, 18 (1958). In 1989, this Court held that the Eighth Amendment did not preclude the death penalty for individuals who murder at sixteen or seventeen years of age. *Stanford v. Kentucky*, 492 U.S. 361 (1989). Whether that holding is still the law of the land is a decision for this Court to make, not a decision for an inferior state or federal court. "[I]t is this Court's prerogative alone to overrule one of its precedents." *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997). That is true even if "'changes in judicial doctrine' ha[ve] significantly undermined" this Court's prior holding, *United States v. Hatter*, 532 U.S. 557, 567 (2001) (quoting *Hatter v. United States*, 64 F.3d 647, 650 (Fed. Cir. 1995)); even if this Court's prior holding "appears to rest on reasons rejected in some other line of decisions," *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989); and even if this Court's holding rests on "'increasingly wobbly, moth-eaten foundations,'" *State Oil Co. v. Khan*, 522 U.S. at 20 (quoting *Khan v. State Oil Co.*, 93 F.3d 1358, 1363 (7th Cir. 1996)).

In startling contrast to these principles, here the Supreme Court of Missouri recognized this Court's precedent, but declined to follow it. The Missouri court acknowledged this Court's holding: that the Eighth Amendment does not

prohibit the execution of sixteen- and seventeen-year-old individuals who murder . (App. A-107, citing *Stanford*, 492 U.S. at 361 (1989); it nevertheless developed and applied the opposite rule: that the Eighth Amendment prohibits the execution of sixteen- and seventeen-year-old murderers. (App. A-109). The Supreme Court of Missouri reached this holding even though this Court declined to overturn *Stanford* three times within the year before the Missouri court ruled. *See Mullin v. Hain*, 538 U.S. 957 (2003) (Mem. Order) (order granting application to vacate stay of execution of defendant who was seventeen when he committed murder); *In re Stanford*, 537 U.S. 968 (2002) (denying writ of habeas corpus of petitioner who was seventeen when he committed murder); *Patterson v. Texas*, 536 U.S. 984 (2002) (same).

The Supreme Court of Missouri rationalized its action by suggesting that the question of whether the Eighth Amendment prohibits the execution of those who murder just before turning eighteen has become, since 1989, an undecided question. (App. A-121). The Missouri court concluded that while the issue had been decided in *Stanford*, it is undecided today because the Eighth Amendment should be interpreted "in a flexible and dynamic manner." (App. A-121, quoting *Stanford*, 492 U.S. at 369).

This analysis by a lower court belittles this Court's role as the Nation's highest court. This Court has never suggested that the precedential value of its Eighth Amendment decisions is less than that of its decisions in other areas. That the Eighth Amendment should be interpreted "in a flexible and dynamic manner" does not license lower courts to interpret that amendment contrary to what they would concede in every other context to be binding precedent from this Court.

Allowing lower courts to reinterpret the Eighth Amendment contrary to this Court's holdings would leave them

free to create their own definitions of "cruel and unusual punishment." There is little likelihood that those courts would reach unanimity on the most serious questions regarding Eighth Amendment protection. That lack of consensus would force this Court to review Eighth Amendment issues even more frequently. But such reexamination would, in turn, have little effect, for the lower courts would have license to again deviate from those renewed precedents.

Such deviations from a national norm are distinguishable, of course, from states creating additional rights for offenders through the legislative process or through their state constitutions. A state court may, without implicating the federal constitution, interpret the statutes, constitution, or common law of its state in a manner that creates additional rights for the offender. But a state court should not be free to decide a federal constitutional issue contrary to precedent from this Court. "It is, after all, a national Constitution [this Court is] expounding." *Jacobellis v. Ohio* 378 U.S. 184, 195 (1964). A "national Constitution" requires national rules.

The Supreme Court of Missouri did not merely suggest that it was free to reinterpret the national constitution; it concluded that it was obligated to do so – *i.e.*, that it was required to reconsider the Eighth Amendment issue decided in *Stanford* on the basis of any "evolving national consensus" it might find in 2003. (App. A-122). The evolving-standard-of-decency principle is, of course, the one this Court has long used in resolving Eighth Amendment issues. *See, e.g., Trop v. Dulles*, 356 U.S. 86, 100-01 (1958) (plurality opinion). And it is an appropriate standard for a lower court to use when this Court has not decided an Eighth Amendment issue. But when this Court has determined that a punishment does or does not violate the Cruel and Unusual Punishment Clause, a lower court should not be free to reanalyze and redecide the issue merely because there is some evidence that the standard has evolved.

Instead, the lower court should apply the controlling precedent - and leave it to this Court to decide when the standard has changed. If a state court wants to protect a young defendant by extending protections this Court has refused, it should do so on state, not federal, constitutional grounds. *See, e.g., Allen v. State*, 636 So.2d 494 (Fla. 1994); *see infra* p. 26.

II.

Principles of stare decisis argue against reversing the holding in *Stanford v. Kentucky*.

Principles of stare decisis create a general obligation to follow prior precedent – in this case, an obligation to follow *Stanford v. Kentucky*. The bright line in *Stanford* has proved workable since 1989. Stare decisis generally requires that such workable lines be retained. *See Planned Parenthood v. Casey*, 505 U.S. 833, 845, 854 (1992). None of the traditional factors that this Court examines in determining whether to overrule a prior decision (*see id.* at 854-59) weighs in favor of overruling *Stanford*.

The decision in *Stanford* led to the kind of reliance that argues against overruling it. *See, e.g., United States v. Title Ins. & Trust Co.*, 265 U.S. 472, 486 (1924). Most notably, state legislatures have relied on this Court's holding in *Stanford* when enacting or considering criminal laws. For example, the Missouri legislature relied on *Stanford* when it amended its first degree murder statute in 1990 to prohibit capital punishment for those who murder before their sixteenth birthday. *See* Mo. Rev. Stat. § 565.020.2 (1994). And presidents and the U.S. Senate have relied on *Stanford* when addressing international treaty issues. *See infra* at 27-28.

This is not an instance in which a legal rule has changed or been found to rest on an erroneous premise, so as to undercut

the foundation for a prior holding. The principles on which *Stanford* is based are not the remnant of some abandoned doctrine. *Patterson v. McLean Credit Union*, 491 U.S. 164, 173-74 (1989). *Stanford* was based on principles articulated by this Court in *Trop v. Dulles* and *Gregg v. Georgia*, 428 U.S. 153, 171 (1976) (opinion of Stewart, Powell, and Stevens, JJ.). *See Stanford*, 492 U.S. at 369. No decision from this Court (or, for that matter, a lower court) has described *Stanford* as a deviation from the line of Eighth Amendment cases that began with *Trop*. Nor has the Court departed from the *Stanford* iteration of the *Trop* rule. Indeed, to the contrary, the Court cited *Stanford* with approval in *Atkins v. Virginia*, 536 U.S. 304, 315 n.18 (2002). Legislatures should be allowed to proceed as *Stanford* permits.

III.

Reversing the *Stanford v. Kentucky* holding could be justified only if there were a contrary national consensus against capital punishment for killers who are seventeen when they murder – and there is no such consensus.

A. Particular punishments are barred by the Eighth Amendment only when there is a national consensus that they are impermissible.

Though the Eighth Amendment bars "cruel and unusual punishments," it does not identify, nor provide criteria for identifying, such punishments. Certainly the list includes those punishments considered cruel and unusual when the Bill of Rights was adopted. *Stanford*, 492 U.S. at 368; *Penry v. Lynaugh*, 492 U.S. 302, 330 (1989). *See also Crawford v. Washington*, 124 S.Ct. 1354, 1373-74 (2004) (scope of Sixth Amendment's Confrontation Clause's protection to accused defined by Framers' intent). But capital punishment for one

who murdered at age seventeen was not considered cruel and unusual at that time. *Stanford*, 492 U.S. at 368.

This Court has repeatedly held, of course, that the list of banned punishments was not fixed in 1789. Rather, it changes as societal views evolve:

> [T]he [Eighth] Amendment has been interpreted in a flexible and dynamic manner. The Court early recognized that "a principle to be vital, must be capable of wider application than the mischief which gave it birth." Thus the Clause forbidding "cruel and unusual" punishments "is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice."

Gregg v. Georgia, 428 U.S. at 171 (citation omitted) (quoting *Weems v. United States*, 217 U.S. 349, 373, 378 (1910)). The Eighth Amendment draws its meaning "from the evolving standards of decency that mark the progress of a maturing society." *Gregg*, 428 U.S. at 173 (quoting *Trop v. Dulles*, 356 U.S. at 101).

Determining the "standard of decency" requires an assessment of contemporary values about the infliction of the sanction. *Gregg*, 428 U.S. at 173. Necessarily, however, the Court has articulated a standard that this assessment must reach. It is not enough to find some who say that a particular punishment is "cruel and unusual." Nor has it ever been enough that many, or perhaps even most, hold that value. Nor has the Court, in the Eighth Amendment context, been willing to rely on research or data purportedly validating those views.

Rather, this Court's modern Eighth Amendment opinions have consistently searched for a "national consensus."

See Atkins v. Virginia, 536 U.S. at 317; *Stanford*, 492 U.S. at 381 (O'Connor, J. concurring); *Penry v. Lynaugh*, 492 U.S. at 334 (1989). Were it to demand anything short of a "national consensus," this Court would itself be declaring something to be a "cruel and unusual punishment," rather than deciding whether a particular punishment has achieved that status.

Demanding a consensus is particularly important because the Eighth Amendment may be a one-way ratchet – *i.e.*, once a punishment reaches the "cruel and unusual" list, it may never come off, no matter how society's view of it may change. As this Court observed in *Gregg v. Georgia*:

> A decision that a given punishment is impermissible under the Eighth Amendment cannot be reversed short of a constitutional amendment. The ability of the people to express their preference through the normal democratic processes, as well as through ballot referenda, is shut off. Revisions cannot be made in the light of further experience.

428 U.S. at 176; *see also Thompson v. Oklahoma*, 487 U.S. 815, 855 (1988) (O'Connor, J., concurring in judgment) (observing that if the Court in 1972 would have held that a national consensus existed to outlaw capital punishment, then this "mistaken premise . . . would have been frozen into constitutional law"). If that is true, the Court must not allow the personal preferences of its current Members guide its decision (although that temptation is great; *see Furman v. Georgia*, 408 U.S. 238, 411 (1972) (Blackmun, J., dissenting)). The Court should not itself become "the ultimate arbiter of the standards of criminal responsibility. . . throughout the country." *Gregg v. Georgia*, 428 U.S. at 175-76 (quoting *Powell v. Texas*, 392 U.S. 514, 533 (1968) (plurality opinion)); *see also Thompson v. Oklahoma*, 487 U.S. at 854 (O'Connor, J., concurring in

judgment) ("I would not substitute our inevitably subjective judgment about the best age at which to draw a line in the capital punishment context for the judgments of the Nation's legislatures.").

To avoid becoming the "ultimate arbiter," making things "cruel and unusual" by judicial fiat, the Court must adopt and apply rules that accommodate legislative movement in more than one direction. Societal views of law enforcement standards do change, as reflected in legislation. As discussed below, *infra* at p. 22-27, states have moved both directions in determining the minimum age for particular punishments. They have made similar moves with regard to other punishment issues.

For example, the kind of punishment upheld in *Ewing v. California*, 538 U.S. 11 (2003), is stricter – perhaps far stricter – than its predecessor. *See id.* at 43 (Breyer, J., dissenting) ("between the end of World War II and 1994 (when California enacted the three strikes law), *no one* like Ewing could have served more than *10 years* in prison." (emphasis in original) (internal reference omitted)). Had the Court ruled before 1994 that a lengthy sentence was "cruel and unusual" merely because it was uncommon (or even unheard of), California would have been constitutionally barred from adopting what this Court so recently upheld.

Whether society's views have become so settled and uniform that there is a new "national consensus" that bars, perhaps forever, a particular punishment is not judged according to anyone's subjective views. Rather, courts must "look to objective indicia that reflect the public attitude toward a given sanction." *Gregg*, 428 U.S. at 173 (plurality opinion); *see also Penry*, 492 U.S. at 331 ("In discerning those 'evolving standards,' we have looked to objective evidence of how our society views a particular punishment today."); *Coker v.*

Georgia, 433 U.S. 584, 592 (1977) (plurality opinion) ("Eighth Amendment judgments . . . should be informed by objective factors to the maximum possible extent."). This Court has focused on two areas for such indicia: legislative acts and jury verdicts. *See, e.g., Stanford*, 492 U.S. at 373; *Penry*, 492 U.S. at 331; *Atkins*, 536 U.S. at 312. The current data in those areas demonstrates no significant change since *Stanford*. There is still not "national consensus" – of the sort this Court has demanded – that it is "cruel and unusual" to impose capital punishment on any person who acts at age seventeen, no matter how heinous the crime.

B. Legislative activity since 1989 reflects the public's continued acceptance of capital punishment as an available sanction for those who murder at seventeen.

The Court has always mandated deference to legislative acts, even in the Eighth Amendment context. *See Stanford*, 492 U.S. at 369-70. Consistent with its own jurisprudence, this Court, in reviewing the decision below, should presume the validity of Missouri's law. Mo. Rev. Stat. § 565.020.2 (1994) (prohibiting capital punishment for those under sixteen). "And a heavy burden rests on those who would attack the judgment of the representatives of the people." *Gregg*, 428 U.S. at 175; *see also Stanford*, 492 U.S. at 373.

But in the Eighth Amendment context, turning first to legislative acts is not merely a matter of deferring to the will of the popularly elected branch. In the cacophony of personal opinions, the legislative voice is the only official expression of the people's will. It is the one voice we deem to be truly representative and collective. As this Court has noted, "the legislation enacted by the country's legislatures" is the "clearest and most reliable objective evidence of how our society views a particular punishment today." *Penry*, 492 U.S. at 331; *see also, e.g., McCleskey v. Kemp*, 481 U.S. 279, 300 (1987).

Thus, the Court explained in *Gregg*:

> "[I]n a democratic society, legislatures, not courts, are constituted to respond to the will and consequently the moral values of the people." The deference we owe to the decisions of the state legislatures under our federal system . . . is enhanced where the specification of punishments is concerned, for "these are peculiarly questions of legislative policy."

428 U.S. at 175-76 (citations omitted) (quoting *Furman*, 408 U.S. at 383 (Burger, C.J., dissenting)); *Gore v. United States*, 357 U.S. 386, 393 (1958). Consistent with *Gregg*, this Court has repeatedly said that it must listen, first and foremost, to the legislative voice when looking for a national consensus. *See, e.g.*, *Enmund v. Florida*, 458 U.S. 782, 789-93 (1982); *Tison v. Arizona*, 481 U.S. 137, 152-53 (1987); *Thompson v. Oklahoma*, 487 U.S. at 826-30; *Stanford*, 492 U.S. at 370.

If the Court is going to reconsider its *Stanford* holding, the first objective question, then, must be whether the Nation's legislatures have spoken in a way that is inconsistent with *Stanford*, *i.e.*, whether they have, since 1989, reached a consensus that any execution of a person who committed his crime before age 18 is "cruel and unusual."

The Court has posed parallel questions a number of times. For example, in *Coker v. Georgia*, the Court considered the States' statutory position with regard to capital punishment for rape. Of the thirty-five states that had at that point reenacted a post-*Furman* capital punishment scheme, only three had extended that scheme to cover rape of an adult woman. 433 U.S. at 594. Two of those had dropped that extension by the time the Court decided *Coker*, making Georgia the "sole jurisdiction in the United States . . . that authorize[d] a sentence

of death when the rape victim is an adult woman." *Id.* at 595-96.

Similarly, in *Enmund v. Florida*, the Court considered the legislative record as to capital punishment for felony murder. 458 U.S. at 789-93. Only eight states authorized capital punishment in a situation where the defendant did not kill, attempt to kill, or intend to kill. *Id.* at 792. And none of the states that had enacted new capital punishment statutes since 1978 had authorized that penalty for "a defendant who somehow participated in a robbery where a murder occurred." *Id.*

Even in *Atkins*, the Court followed this path, noting first that there was no record of "any state legislative consideration of the suitability of imposing the death penalty on mentally retarded offenders prior to 1986." 536 U.S. at 313. The Court then identified 19 state legislatures that had barred such executions since 1986 – and pointed out that none had gone the other direction. *Id.* at 314-17.

The Missouri Supreme Court claimed to be stepping in this Court's *Atkins* footprints. But in reality, it took a different route, for the kind of legislative record that was critical in *Coker*, *Enmund*, and *Atkins* was not available here. Rather, the record since *Stanford* is mixed.

In *Stanford*, this Court identified twelve states, out of thirty-seven that had capital punishment, that expressly excluded that penalty as an option for the seventeen-year-old offender. 492 U.S. at 370, 370 n.2. *See also Atkins*, 536 U.S. at 315 n. 18 (contrasting the post-*Penry* legislative record with regard to the mentally retarded and the *post-Stanford* record regarding "the threshold age for imposition of the death penalty."). Today, the situation is not appreciably different. We do not yet have a pattern of lawmaking sufficient to

establish a national consensus that capital punishment is "cruel and unusual" when imposed on anyone "so much as one day under" eighteen. *See Thompson*, 487 U.S. at 859 (Scalia, J., dissenting).

1. *Since* Stanford, *few states legislatures have raised the age for capital punishment.*

In holding that such a consensus now exists, the Supreme Court of Missouri concluded that five states had joined the *Stanford* list of twelve that barred capital punishment entirely when the defendant was under age eighteen at the time of the crime. In fact, only two legislatures had decided to raise the age for eligibility: Indiana and Montana. Ind. Code Ann. § 35-50-2-3(b)(1)(A) (West Supp. 2003); Mont. Code Ann. § 45-5-102(2) (2003). Two legislatures have more recently done so: South Dakota and Wyoming (2004 S.D. Laws Ch. 166 (S.B. 182); 2004 Wyo. Sess. Laws Ch. 29 (H.B. 5)). The legislatures in the other states listed by the Missouri court – Kansas, New York, and Washington – have not changed the age limit.

When this Court decided *Stanford*, Kansas was among the states that did not have capital punishment as a sentencing option. *See Thompson v. Oklahoma*, 487 U.S. at 826 n.25. When Kansas adopted its new capital punishment statute, the legislature did not deal specifically with offenders under eighteen; it merely carried over a distinction in its existing sentencing law. Previously, the maximum Kansas prison sentence was 40 years without parole, and Kansas exempted offenders under eighteen from that prison term. Kan. Stat. Ann. § 21-4622 (1990). When Kansas made capital punishment an alternative to the 40-year sentence, it did not modify the juvenile exception. Kan. Stat. Ann. § 21-4622 (1995). There was not a legislative vote in favor of any particular age.

New York, too, rejoined the capital punishment states

after *Stanford*. N.Y. Penal Law § 60.06 (McKinney 2004). And like Kansas, New York did not deal specifically with under-eighteen offenders. The maximum prior sentence was life imprisonment without parole. New York, like Kansas, had exempted offenders under eighteen from these prison terms. And New York, too, carried that over into its capital punishment law – though indirectly. New York's age limitation is not found in its sentencing law, but in the law defining the crime itself; since 1974, an element of first degree murder in New York has been that the offender be more than eighteen years old. *See* N.Y. Penal Law § 125.27(1)(b) (McKinney, 2004); 1974 N.Y. Laws Ch. 367, § 2. In New York, a murderer under eighteen could not be convicted of first degree murder either before or after *Stanford*.

Neither Kansas nor New York raised its age for conviction and sentence for first degree murder since *Stanford*. Again, all they did was add capital punishment to existing sentencing regime. That is not a solid suggestion that the people of those states have recently concluded that capital punishment cannot be available for any person who commits a crime at age seventeen.

Washington provides even less support for the Missouri court's claimed new legislative consensus. The change that the Missouri court cites was not a legislative one at all. When the Washington legislature enacted its current death penalty statute in 1981, the legislature included no minimum age for death eligibility. 1981 Wash. Laws 535 (1981) (codified at Wash. Rev. Code Ann. § 10.95.030(2) (West 2004)). *Stanford* did not prompt a legislative change. Rather, the Supreme Court of Washington held the statute to be "unconstitutional as applied to defendants fifteen years or younger if interpreted to authorize imposition of the death penalty following decline of jurisdiction in juvenile court." *State v. Furman*, 858 P.2d 1092, 1103 (Wash. 1993). The state statutory scheme as written allowed a

person under sixteen to be tried as an adult and potentially sentenced to death. The Washington court concluded that it must declare unconstitutional a death sentence for any juvenile – even one who was seventeen at the time of his offense. *Id.* at 1096, 1103 (offense occurred two months before defendant's eighteenth birthday). Thus the threshold age for execution in Washington is now eighteen. But again the change was not the result of legislative action.

In sum, then, the Missouri court should not have suggested that Kansas, New York, or Washington raised the minimum age for capital punishment. In fact, nearly all of the states whose positions were important in *Stanford* still stand in the same place.

2. *Meanwhile, other states have legislatively confirmed sixteen as the minimum age, as permitted by* Stanford.

In *Atkins*, the Court looked not only to the current position of the states, but also to the pace and direction of change. Critical to the *Atkins* holding was "the consistency of the direction" in legislative acts. 536 U.S. at 315. Here, the movement is not in a consistent direction; instead of raising the age for capital punishment eligibility, various states have confirmed positions that were once merely implicit, or have even moved the other way. Indeed, the record today is not appreciably different from the record in 1989, when Justice O'Connor noted the phenomenon of states setting sixteen as the minimum age for capital punishment. *Stanford v. Kentucky*, 492 U.S. at 381 (O'Connor, J., concurring).

Since this Court's 1986 decision in *Thompson v. Oklahoma*, some state legislatures have set sixteen as their minimum age for the imposition of capital punishment. As noted above, *supra* at pp. 14, 19, in 1990, the Missouri

legislature established sixteen as its minimum age. *See* Mo. Rev. Stat. § 565.020.2 (1994). And in Virginia, the General Assembly amended its law in 2000 to expressly allow capital punishment for offenders who were sixteen years or older at the time of the offense. *See* Va. Code Ann. § 18.2-10(a)(2003); 2000 Va. Acts Ch. 361 (H.B. 978).

In Arizona, the people, acting as the legislature by initiative, made a parallel change, exposing more sixteen- and seventeen-year-old offenders to the possibility of capital punishment. On November 5, 1996, Arizona voters passed Ballot Proposition 102, the Juvenile Justice Initiative. It repealed former Arizona Constitution Article 6, § 15, which gave superior courts the authority to transfer a juvenile for prosecution. Under the new amendment, juveniles fifteen years of age or older who are accused of murder and other violent felony offenses would be prosecuted as adults. *See* Ariz. Const. art. 4, pt. 2, § 22(1). The voters' purpose in adopting the constitutional amendments was to speed the pace and to augment the effectiveness of the juvenile justice system in Arizona and to respond more stringently to juvenile crime when appropriate. *In re Cameron T.*, 949 P.2d 545, 550 (Ariz. Ct. App. 1997). Eliminating the discretionary step of the juvenile justice system and vesting mandatory criminal prosecution jurisdiction in the criminal trial court would have the effect of exposing more juvenile offenders to the possibility of capital punishment. That is, the amendment would divest the juvenile courts – which cannot impose capital punishment – of jurisdiction over certain juvenile offenders, including those charged with murder. *See also* Ariz. Rev. Stat. § 13-501 (2004) ("the county attorney shall bring a criminal prosecution against a juvenile in the same manner as an adult if the juvenile is fifteen, sixteen or seventeen years of age and is accused of . . . first degree murder in violation of § 13-1105."). The amendment is the clearest expression of the people's voice.

Later, the Arizona Supreme Court rejected the amendment, but on grounds that cast no doubt on the people's meaning. The court held that the new procedures were insufficient to allow individualized consideration of the appropriate sentence, required by this Court in *Lockett v. Ohio*, 438 U.S. 586, 605 (1978) (plurality opinion). *See State v. Davolt*, 84 P.3d 456, 479-81 (Ariz. 2004). That judicial ruling, however, does not erase, for purposes of considering whether there is a new consensus, the legislative voice endorsing the availability of capital punishment for sixteen- and seventeen-year-old murderers.

In Florida, the process leading to a similar endorsement was prompted by judicial action. In *Allen v. State*, 636 So.2d 494 (Fla. 1994), the Florida Supreme Court concluded that a Florida statute allowing the death penalty for a fifteen year old violated Article I, § 17 of the Florida Constitution. *Id.* at 497. Section 17, as it then read, prohibited imposition of "cruel *or* unusual" punishment (emphasis added). That decision prompted a response by the people, in their legislative role.

In November 2002, Florida voters overwhelmingly approved a state constitutional amendment that changed the state constitutional standard from "cruel or unusual" to "cruel and unusual," mirroring the Eighth Amendment standard in the federal constitution. Florida Const. art. I, § 17 (as amended 2002); elections results available at http://election.dos.state.fl.us/elections/resultsarchive/Index.asp?ElectionDate=11/5/02&DATAMODE=. It was adopted when *Stanford* defined the scope of the Eighth Amendment with regard to capital punishment for those under eighteen. Thus the legislative decree in Florida effectively *lowered* the age of eligibility, to the level approved in *Stanford*.

That movement – especially when combined with states that affirmed, post-*Stanford*, the sixteen-year-old line –

demonstrates that here, unlike in *Atkins*, there is not a "consistency of direction" suggesting that we have reached a new "national consensus."

3. *Congress has maintained the availability of capital punishment for those who commit crimes at age seventeen.*

State legislatures are not, of course, the only legislative voice. The people also speak through their elected members in Congress. And since *Stanford*, the United States Senate, in cooperation with the President, has expressly preserved the States' ability to apply their own capital punishment laws to those who commit heinous crimes before turning eighteen.

For example, when the Senate ratified the International Covenant on Civil and Political Rights (ICCPR) in 1992, it did so with a series of reservations, understandings, and declarations. These included specific reservation of the right to impose capital punishment on youthful offenders:

> [T]he United States reserves the right, subject to its Constitutional constraints, to impose capital punishment on any person (other than a pregnant woman) duly convicted under existing or future laws permitting the imposition of capital punishment, including such punishments for crimes committed by persons below eighteen years of age.

U.S. Senate Resolution of Advice and Consent to Ratification of the International Covenant on Civil and Political Rights, 138 Cong. Rec. 8070 (April 2, 1992). The reservations, understandings, and declarations were proposed by the President, adopted by the Senate as a condition of its advice and consent to the ICCPR, and included with the United States

Instrument of Ratification deposited with the United Nations. *See* Curtis A. Bradley & Jack L. Goldsmith, *Treaties, Human Rights and Conditional Consent*, 149 U. Pa. L. Rev. 399, 404 (2000) (hereinafter "Bradley").[2]

Contemporaneous with *Stanford*, the United States was negotiating the text of the proposed United Nations Convention on the Rights of the Child. During these negotiations, the United States delegation objected to a proposed ban on juvenile executions, but did not insist on deletion of that provision "provided it was understood that the United States maintained its right to make a reservation on this point." The United Nations Convention on the Rights of the Child: A Guide to the "Travaux Preparatoires" 465 (Sharon Detrict, ed., 1992). President Clinton signed the Convention in 1995, but stated that he would ask the Senate to attach "a number of reservations and understandings" to " protect the rights of various states under the nation's federal system of government and maintain the country's ability to use existing tools of the criminal justice system in appropriate cases." Press Release, White House Press Office, Statement on US Decision to Sign UN Convention on the Rights of the Child (Feb. 10, 1995). The Senate has not ratified the Convention Curtis A. Bradley, The Juvenile Death Penalty and International Law, 52 Duke L.J. 485, 512 (2002), and thus has declined to endorse the capital punishment ban that the Convention contains.

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[2] A final draft of ICCPR had been completed in 1966 and the treaty took effect in 1976, all without formal United States involvement. The United States had signed the ICCPR in 1977, but President Jimmy Carter quickly followed this signature with proposed conditions on the United States ratification, including a condition declining to agree to the juvenile death penalty provision. Message from the President of the United States Transmitting For Treaties Pertaining to Human Rights, S.Exec. Docs. C, D, E, and F, 95-2, at III-IV (1978).

* * *

Of course, it is not Missouri's burden to show a national consensus in favor of capital punishment for those who murder at seventeen. *See Stanford*, 492 U.S. at 373. But the foregoing amply demonstrates a different national consensus: one that preserves the ability of individual state legislatures to make that penalty available for the most heinous and dangerous crimes, even when committed by those who have not quite reached eighteen. That consensus is entirely inconsistent with the holding of the Supreme Court of Missouri.

C. Jurors continue to impose capital punishment contrary to the alleged consensus.

The second objective factor "the Court has examined in determining the acceptability of capital punishment to the American sensibility is the behavior of juries." *Thompson v. Oklahoma*, 487 U.S. at 831 (plurality opinion of Stevens, J.). Thus, in determining that there was not a national consensus against capital punishment of those offenders who were sixteen at the time of the murder, this Court looked at the rate of sentencing of those offenders. *Stanford*, 492 U.S. at 373-75. Similarly, in *Atkins,* the court looked at "[t]he practice" of imposing capital punishment on the mentally retarded. *Atkins*, 536 U.S. at 316. Noting the change in jury verdicts since *Penry*, in the *Atkins* Court determined that such verdicts pointed toward a consensus further limiting capital punishment for the mentally retarded. *Id.* But comparing current data with that considered in *Stanford* points the opposite direction here.[3]

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[3] Petitioner does not mean to suggest, by reference to the kind of data considered in *Stanford*, *Penry*, and *Atkins*, that such data tells us much about societal views about punishment, rather than about patterns of criminal activity. Perhaps such views could be accurately ascertained by comparing jury verdicts for comparable crimes committed by persons at various ages. But we

In *Stanford*, the Court looked first at the ages at which those who received capital sentences had committed their crimes. The Court noted that between 1982 and 1988, fifteen of the 2,106 death sentences were imposed on individuals who were sixteen years of age or younger. *Stanford*, 492 U.S. at 373. During that same time period thirty death sentences were imposed on those who were seventeen at the time of the crime. *Id.* These death sentences, 45 out of 2,106, represented 2.1% of the total sentences. *Id.*

Two people who were fifteen, 32 who were sixteen, and 89 people who were seventeen received capital sentences between 1990 and 2003. Victor Streib, The Juvenile Death Penalty Today: Death Sentences and Executions for Juvenile Crimes, January 1, 1973 - March 15, 2004 at page 9 (Table 4) (March 15, 2004) (available on-line at http://www.law.onu.edu/faculty/streib/JuvDeathMar152004.pdf) (hereinafter "Streib").[4] Those aged fifteen, sixteen, and seventeen at the time they killed totaled 123 out of the total 359 death sentences for this period. *Id.* That is significantly more proportionately, than the 2.1% noted by the court in *Stanford*. This sentencing data points away from the consensus that the Supreme Court of Missouri purported to find.

In *Stanford*, the Court looked not only at sentencing, but at actual executions. The Court noted the actual executions for crimes committed under age eighteen accounted for 2% of the total number of executions between 1642 and 1986. *Stanford*, 492 U.S. at 373-74. Comparing that with the data for 1973 through 2003 reveals an upward trend. Since 1973, 22

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are aware of no such data.

[4]Actually, the number may be higher, Streib acknowledges that his data "almost invariably under-report the number of death sentenced juvenile offenders. . . ." Streib, *supra*, at page 2.

individuals who murdered at the ages of sixteen and seventeen have been executed, out of a total of 901 executions – a rate of 2.4%. Thus executions of those who were sixteen and seventeen years old at the time they murdered is 20% higher, as a proportion of total executions, than the historical rate of 2% noted by the court in *Stanford*. Streib, *supra*, at 4.

Finally, in *Stanford* the Court observed that the last execution of a person who committed a crime under seventeen years of age had occurred in 1959. 492 U.S. at 374. The question here, of course, is punishment for those who murder at seventeen. And the execution data there is telling: twenty-one since 1973. Streib, *supra*, at 4. Again, the data regarding actual executions points away from the kind of consensus for limiting capital punishment that this Court found in *Atkins* and the Missouri court found here.

Instead of looking at sentences and executions, as this Court did in *Stanford*, 492 U.S. at 373-74, the Supreme Court of Missouri looked only at the number of states that had actually conducted executions. Since 1985, seven states, including Missouri, had since 1985, executed an offender who was sixteen or seventeen at the time of the offense. Streib, *supra*, at 4. Nothing in that data supports the consensus that the Missouri court posits.

Even if counting states performing executions were the appropriate method of analysis, the data relied upon by the Missouri court would be insufficient. It severely understates the situation. Currently thirteen states – including Missouri – have individuals awaiting capital punishment who committed their crimes while under age eighteen. *Id.* at 24-30. There is no basis in the Missouri court's decision for supposing that the absence of such individuals from other states' lists is the result of juries' views regarding capital punishment. The fact remains that capital sentences and executions of those who commit

heinous crimes before turning eighteen are more common now than they were when *Stanford* was decided. The contemporary history of jury verdicts simply does not support the claim that imposing capital punishment on persons who commit heinous crimes shortly before turning eighteen has "become truly unusual," or that it would be "fair to say that a national consensus has developed against it." *Atkins*, 536 U.S. at 316.

D. A new consensus contrary to *Stanford* is unlikely, given that making capital punishment available as a penalty for those who, before turning eighteen, methodically commit the most heinous crimes serves society's interests in retribution and deterrence.

Moving away from objective indications of consensus, the Court has also addressed whether capital punishment for sixteen- or seventeen-year-old murderers serves the societal purposes that capital punishment fulfills. *See Ford v. Wainwright*, 477 U.S. 399, 409 (1986). Of course, in this respect, the Missouri court never implies that something has changed since 1989 to suggest that this Court was wrong on this point in *Stanford*, or that the analysis today should be any different. Nor does the Missouri court consider that whether a society should allow capital punishment as an option for any particular group of murderers is, in the first instance, a political question. Whether capital punishment in those circumstances effectively serves societal goals such as retribution and deterrence is a question better answered in legislative rather than in judicial forums. Nonetheless, to the extent the Supreme Court of Missouri assumed that role (*see* App. A-130 to A-131), it relied on faulty premises.

Initially, the Missouri court seems to have found that those who murder at age seventeen are less culpable as a class than those who murder at age eighteen. (App. A-131). This Court has rejected that contention, and the court below gives no

reason to set aside this Court's analysis. In *Stanford*, the Court rejected a constitutional policy of stereotyping on the basis of an offender being age sixteen or seventeen. 492 U.S. at 378. Instead, the Court recognized that the abilities of individual youth differ; thus, it should be up to the jury to determine the appropriate punishment. *See id.*

The correctness of this Court's conclusion – and the error in the assumption made below – seems obvious. Youth mature, but not in a uniform way. As the President's Commission on Law Enforcement and Administration of Justice concluded:

> [S]ome youths handled by juvenile courts are hardened, dangerous offenders, while some adults older than the arbitrary upper age are emotionally and sometimes physically immature individuals.... No chronological age bracket is uniformly identical or entirely homogenous.

The President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Juvenile Delinquency and Youth Crime (1967), at 119-20. *See also Fare v. Michael C.*, 442 U.S. 707, 734 n.4 (1979) (Powell, J., dissenting).

The variation in the maturation process minimizes the value of age, standing alone, as a basis for determining when capital punishment serves or fails to serve societal interest. "[A]ge is simply a 'proxy' for a combination of factors such as maturity, judgment, responsibility, and the capability to assess the possible consequences of one's conduct." Joseph L. Hoffmann, *On the Perils of Line Drawing: Juveniles and the Death Penalty*, 40 Hastings L.J. 229, 258 (1989). There is certainly a point at which age is an appropriate proxy for determining whether imposing capital punishment on an

individual makes sense, even without legislation. In the common law, it was age seven. *Thompson v. Oklahoma*, 487 U.S. at 864 (Scalia, J. dissenting), citing 4 Blackstone Commentaries *23-*24. Under the consensus recognized in *Thompson* and *Stanford*, it is sixteen.

But in general, the social question of the minimum age at which capital punishment can be imposed – even for most heinous crimes – is not one that can be answered with any certainty. Thus the Missouri legislature's post-*Stanford* decision to set the line at sixteen should be given substantial deference. *See Gregg v. Georgia*, 428 U.S. at 174-76. The legislatures in Missouri and elsewhere could rationally determine; given their review of social science literature and their statutes, and from their own experiences, that the societal purpose of retribution is fulfilled by capital punishment with the constitutional line drawn at sixteen. *See id.* at 186-87. And those legislatures could rationally determine that, with the sixteen- and seventeen-year-old offender, the need for specific deterrence and incapacitation is greater than for older offenders, because of the longer period in which the offender could reoffend.

Any such line is to some degree imprecise. If the courts push further into the business of establishing such lines, they will inevitably be faced with more and more questions. If the line is eighteen, why not twenty-one? Or thirty-five? Courts relying on such ephemeral concepts as the effectiveness of retribution and deterrence will find no principled place to stop. That legislatures have adopted different ages as proxy for maturity in other contexts provides no comfort in this respect. Missouri permits driving at age fifteen, and unsupervised driving at sixteen. (Mo. Rev. Stat. §§ 302.060(2), 302.130.1) (2000). It forbids use of alcohol until twenty-one (Mo. Rev. Stat. § 311.325 (2000)). Both are legislative judgments about the ability of persons to manage complex, peer-influenced

behavior and the threat such behavior poses to public safety. Tying a decision here to any one of the age limits imposed in other contexts will merely ensure myriad future cases citing as authority statutes setting higher limits in less relevant circumstances.[5]

Certainly nothing in the facts of this case suggests that the Missouri legislature's decision to set the line for capital punishment at the point approved in *Stanford* was irrational or inappropriate. Respondent Simmons did not act impulsively; he deliberately planned the burglary and murder. There is no indication that he was unable to control his emotions and is therefore less culpable. There is no indication that he was led in the crime by older individuals; to the contrary, Simmons recruited a fifteen and sixteen year old. The suggestion that Simmons was unable to perform the cost-benefit analysis associated with deterrence is unsupportable on the record here. That Simmons told others they could avoid the most serious punishment because they would be processed by the juvenile justice system shows his concern about potential sanctions for his wrongdoing and his misunderstanding of the reach of that system, not a deficient ability to understand the consequences of his actions.

Addressing deterrence, it is possible that the Missouri court concluded that because few seventeen year old offenders are executed, there is no deterrent effect. (App. A-133). Hopefully, the principal reason few seventeen-year-old offenders are subjected to capital punishment is because few commit, with the requisite mental state, capital crimes. Perhaps that is because the deterrent impact of even a few executions

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[5] That is particularly true as to references to state laws that are affected – or even coerced – by federal laws. *See, e.g.*, 23 U.S.C. § 158(a)(1) (2000).

has been great. Regardless, to use that data to suggest a diminished deterrent effect required the Missouri court to ignore the impact of even two years of maturation – two years that are important to juries. As noted earlier, the possibility of a seventeen-year-old offender being executed is significantly higher than it was for the fifteen-year-old offender in *Thompson v. Oklahoma*. Only five fifteen-year-old offenders are discussed in *Thompson*, 487 U.S. at 832-33; now 73 offenders (not including Simmons) who were sixteen or seventeen years old when they committed their crimes await execution. Streib, *supra*, at pages 3, 23-29.

To the traditional concerns with how capital punishment applied to a defined group serves societal interests in deterrence and retribution, the Missouri court, perhaps prompted by a brief reference in *Atkins*, 536 U.S. at 321, added a concern that "the risk of wrongful execution" existed with young offenders. (App. A-133). The court presented no authority for this proposition. And the court's analysis is facile. The court asserted that youthful defendants have had less time as compared to older ones to develop mitigating evidence. (App. A-133). That argument is a neutral one; youthful defendants have had less time to develop aggravating circumstances as well. Further, a youthful defendant would have had time to develop ties with local schools, counselors, coaches, and the like; thus, those defendants have ample ability to develop mitigating evidence. There is no categorical risk of error when youthful defendants are tried that would justify courts taking over the legislative role of defining the age at which persons, regardless of their crimes, should be subject to capital punishment.[6]

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[6] The court below also concluded that there was a risk of wrongful execution in this particular case because the government rebutted the mitigating aspect of petitioner's age at the time of the murder. (App. A-133). That point is misplaced on the record in this case. But even if it were supportable, the point could justify, at most, a rule regarding how mitigation evidence is presented and argued, not a blanket rule against capital punishment for those who commit crimes at seventeen.

But again, whether and how making capital punishment available as a penalty for some crimes committed by some seventeen year olds increases risks of error and serves society's interests in retribution and deterrence are not questions that can be answered by objective criteria. And though answering them may tell us whether there should be a national consensus allowing or disallowing such a penalty, they tell us little or nothing about whether there is a consensus one way or the other.

E. Other evidence cited by the Missouri Supreme Court is largely inapposite and entirely insufficient to demonstrate a new and different national consensus.

This Court has debated the appropriateness of looking anywhere beyond legislative acts and jury verdicts in determining what constitutes a consensus that standards have evolved to the point that a particular punishment now violates constitutional guarantees. Compare *Stanford*, 492 U.S. at 377 with *id.* at 391 (Brennan, J., dissenting). One area of debate has been whether and how the Court should evaluate the value of capital punishment in terms of retribution and deterrence. compare *Stanford*, 492 U.S. at 379-80 with *id.* at 403-05 (Brennan, J., dissenting). In the course of discussing the possibility of consensus, members of the Court have also mentioned other kinds of evidence. The Missouri court took the hints, and invoked various other sources in its search for consensus. Those sources are largely inapposite, their use is problematic, and ultimately they do not lead to the conclusion the Missouri court reached.

Polls and other social science research.

One basis cited by the Missouri court for its decision was political polls concerning support for the death penalty for juveniles. (App. A-i29). This Court has said, quite correctly, that political polling data is an uncertain foundation upon which to rest constitutional law. *Stanford*, 492 U.S. at 377. *See also Atkins v. Virginia*, 536 U.S. at 326-27 (Rehnquist, C.J., dissenting), and 328-37 (Appendix to Opinion of Rehnquist, C.J.). Justice Marshall observed that the utility of public opinion polls in ascertaining standards of decency "cannot be very great." *Furman v. Georgia*, 408 U.S. at 361 (Marshall, J., concurring). In *Atkins*, the Court's reference to polling data and the views of various social and professional organizations was relegated to a footnote, and the Court noted that "these factors are by no means dispositive." 536 U.S. at 316. But here, even if polls were dispositive, they would not demonstrate the consistency and accuracy necessary to support a claimed national consensus.

Perhaps reflecting concern about the rising rate of crime committed by juveniles, the 34% of Missourians who support capital punishment for juveniles (App. A-129; citing Juvenile Offender Public Opinion Survey, Center for Advanced Social Research, University of Missouri - Columbia (Mar. 2003) available at http://www.abanet.org/crimjust/juvjus/mopoll.pdf)) is substantially higher than the 1965 Gallup Survey that reported 23% favored the death penalty for persons under twenty-one years of age. Victor Streib, Death Penalty for Juveniles, 33 (1987). The issue before the Court is not whether a majority of the public supports or opposes capital punishment in these circumstances, a legislative issue, but whether it is "generally abhorrent to the conscience of the community." *Thompson v. Oklahoma*, 487 U.S. at 832. Assuming for the sake of argument that the 34% of Missourians figure cited by the Missouri court represents the current national view, more

than one person in three supports retaining authority to execute those who commit a capital homicide at age seventeen.

That polls do not prove a national consensus against imposing capital punishment on any person who commits any crime before turning eighteen is further demonstrated by the fact that the more specific or concrete the poll question is, the higher the response favoring use of capital punishment – and by fluctuations in public opinion, as people hear of particularly heinous crimes committed by young people. After the March 24, 1998 school shooting in Jonesburg, Arkansas, half of the Americans polled said that eleven- and thirteen-year-old boys should receive capital punishment. James Garbarino, Lost Boys 20 (1999). Similarly, when asked in the context of the D.C. sniper shooting whether a particular sixteen- or seventeen-year-old accused capital offender (Lee Boyd Malvo) should be executed if found guilty of a capital offense, the answer was overwhelmingly "yes." A Vote.com poll taken in the wake of the D.C. sniper shootings, asked whether we should "Abolish the death penalty for minors?" Seventy-six percent responded, "No! Murderers shouldn't be able to use age to limit punishment."[7] And the Harris Interactive survey for CNN and Time Magazine found that 51% of respondents supported the death penalty for suspected D.C. sniper Lee Boyd Malvo if he were found guilty.[8] Poll questions that inquire about executing "juveniles" or "minors" in general terms are not reliable indicators of public opinion about whether no sixteen- or seventeen-year-old criminal who commits premeditated murder

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[7] Vote.com poll results may be found at http://www.vote.com/vResults/index.phtml?voteID=49155414&cat=4075633.

[8] Results of the Harris Interactive survey are reported by the Death Penalty Information Center on their website: http://www.deathpenaltyinfo.org/article.php?scid=27&did=883.

should ever be eligible for the death penalty.

Social science research into juror voting, using hypothetical cases before ersatz jurors, also demonstrates societal acceptance of capital punishment of young offenders. *See* Catherine A. Crosby, et al., *The Juvenile Death Penalty and the Eighth Amendment*, 19 Law & Human Behavior 245 (1995). While only 60% of the study participants voted to execute the study's ten-year-old defendant, the figure rose to 90% in favor of capital punishment of the defendant who was sixteen years old. *Id.* at 254. Forty percent of juvenile court judges believe that the death penalty is warranted for some juvenile offenders. Rorie Sherman, Juvenile Judges Say: Time to Get Tough, The National L.J., Aug. 8, 1994, at A1. Such study and survey data, like polling data, reveals that there is no national consensus opposing capital punishment for offenders who murder at age seventeen.

Opinions of "expert" and self-selected interest groups.

The Missouri court also looked to the positions of lobbyist and special interest groups. (App. A-129). The court did not attempt to articulate the significance of counting the number of such groups in determining whether respondent had met his heavy burden of showing a national consensus opposing capital punishment for those who offend at ages sixteen and seventeen. And this Court wisely "decline[d] the invitation to rest constitutional law upon such uncertain foundations" in *Stanford*. 492 U.S. at 377. Courts should not be in the position of trying to determine whether a vote of a committee of the YMCA of the USA (App. A-129), and other groups with their inherent biases, constitutes meaningful evidence of a national consensus.

International views.

The Missouri court also took note of views of the international community in opposition to capital punishment. (App. A-130). The court below did not, nor could it, explain how such views reflect an American consensus that evolving standards of decency proscribe capital punishment for one who murders at seventeen.

To support its theory, the court below referred to Article 37(A) of the United Nations Convention on the Rights of the Child. (App. A-130). As discussed above, that treaty has not received the advice and consent of the United States Senate. *See supra* at p. 28. Indeed, "the United States is the only country in the world that has not yet ratified this international agreement, in large part because of our desire to remain free to retain the death penalty for juvenile offenders." Streib, *supra*, at 8.

The court below also found "of note" that two other countries allow capital punishment of those who offend when they are sixteen and seventeen. (App. A-130). Again, the court below did not, nor could it, explain how the justice practices of other countries, be they Iran or Congo or even Canada or Great Britain, show our national consensus for or against any particular limit on capital punishment. As the Court observed in *Stanford*, the Eighth Amendment inquiry is into the standard of decency in modern American society as a whole, not the standard in soc[illegible]ties in first, second, or third world countries. *Stanford*, 492 U.S. at 369 n.1. This Court has properly stated that in ascertaining the standard of decency of American society, courts should look to the political attitudes of our society, not of societies from around the globe. *Id.*

* * *

These kind of considerations, though discussed by this Court in the past, have never been the basis for a decision that American standards of decency have evolved so as to make any

particular punishment "cruel and unusual." At most, they have buttressed positions based on more objective indicia of a national consensus. To turn now to these ephemeral considerations would open the door to abuse and uncertainty – particularly were the Court, as discussed in point I, *supra*, to free the lower courts to reach their own independent and contradictory conclusions as to what the Eighth Amendment means.

CONCLUSION

For the reasons stated above, the Court should reverse the decision of the Missouri Supreme Court and reaffirm its holding in *Stanford v. Kentucky*.

Respectfully submitted,

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No. 03-633

IN THE

Supreme Court of the United States

DONALD P. ROPER, SUPERINTENDENT,
POTOSI CORRECTIONAL CENTER,

Petitioner,

v.

CHRISTOPHER SIMMONS,

Respondent.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF MISSOURI

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Whether the Cruel and Unusual Punishments Clause of the Eighth Amendment bars infliction of the death penalty on offenders who were under the age of eighteen at the time of the offense.

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LEGISLATIVE MATERIALS

FLORIDA

H.R. Committee on Crime Prevention, Corrections & Safety, Final Analysis, House Bill 951 (June 26, 2001) 42
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S. 513 (N.H. 2004) 40
H.R. 63 (N.H. 2004) 40

NEW YORK

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Record of Proceedings, N.Y. State Assembly, Bill No. 4843 (Mar. 6, 1995) 40

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African Charter on the Rights and Welfare of the Child, art. 5(3), OAU Doc. CAB/LEG/24.9/49 (1990) (entered into force Nov. 29, 1999) 48
American Convention on Human Rights, Nov. 22, 1969, art. 4(5), 1144 U.N.T.S. 143 (entered into force July 19, 1978) 48
International Covenant on Civil and Political Rights, Dec. 16, 1966, art. 6(5), 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) 48
United Nations Convention on the Rights of the Child, Nov. 20, 1989, art. 37, 1577 U.N.T.S. 3, 28 I.L.M. 1448 (entered into force Sept. 2, 1990) 48

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ADJUDICATIONS

Domingues v. *United States*, Case No. 12.285, Inter-Am. C.H.R. Rep. No. 62/02 (2002) 49, 50
Roach and Pinkerton v. *United States*, Case No. 9647, Inter-Am. C.H.R. Rep. No. 3/87 (1987) 50

OTHER MATERIALS

African Union, List of Countries Which Have Signed, Ratified/Acceded to the African Charter on the Rights and Welfare of the Child, *available at* www.africa-union.org (last visited July 19, 2004) 48
Office of the U.N. High Commissioner for Human Rights, Declarations and Reservations to the Convention on the Rights of the Child, *available at* www.ohchr.org / English / law / crc-reserve.htm (last visited July 19, 2004) 48
Office of the U.N. High Commissioner for Human Rights, Status of Ratifications of the Principal Human Rights Treaties (June 9, 2004), *available at* www.unhchr.ch/pdf/report.pdf 48
Organization of American States, American Convention on Human Rights, *available at* www.oas.org/juridico/english/Sigs/b-32.html (last visited July 19, 2004) 48

OTHER AUTHORITIES

Amnesty International, *Stop Child Executions! Ending the Death Penalty for Child Offenders* (2004) (AI Index: ACT 50/001/2004) 49
Amnesty International, *The Exclusion of Child Offenders from the Death Penalty Under General International Law* (2003) (AI Index: ACT 50/004/2003) 49

TABLE OF AUTHORITIES—Continued

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Arnett, Jeffrey, *Reckless Behavior in Adolescence: A Developmental Perspective*, 12 Dev. Rev. 339 (1992) 16, 17, 18, 25

Bechara, Antoine, et al., *Characterization of the Decision-Making Deficit of Patients with Ventromedial Prefrontal Cortex Lesions*, 123 Brain 2189 (2000) 21

Bechara, Antoine, et al., *Dissociation of Working Memory from Decision Making Within the Human Prefrontal Cortex*, 18 J. Neurosci. 428 (1998) 21

Bennett, William J., et al., *Body Count: Moral Poverty ... And How to Win America's War Against Crime and Drugs* (1996) 43

Bridges, George S. & Sara Steen, *Racial Disparities in Official Assessments of Juvenile Offenders: Attributional Stereotypes as Mediating Mechanisms*, 63 Am. Sociological Rev. 554 (1998) 31

Cabeza, Roberto & Lars Nyberg, *Imaging Cognition II: An Empirical Review of 275 PET and fMRI Studies*, 12 J. Cognitive Neurosci. 1 (2000) 20

Casey, B.J., et al., *Structural and Functional Brain Development and its Relation to Cognitive Development*, 54 Bio. Psych. 241 (2000) 21, 22

Cauffman, Elizabeth & Laurence Steinberg, *(Im)maturity of Judgment in Adolescence: Why Adolescents May Be Less Culpable Than Adults*, 18 Behav. Sci. & L. 741 (2000) 18, 19, 20

Crosby, Catherine A., et al., *The Juvenile Death Penalty and the Eighth Amendment*, 19 L. & Hum. Behav. 245 (1995) 47

Dahl, Ronald E., *Affect Regulation, Brain Development, and Behavioral/Emotional Health in Adolescence*, 6 CNS Spectrums 60 (2001) 18

TABLE OF AUTHORITIES—Continued

Page

Dobbs, Ashley, *The Use of Youth as an Aggravating Factor in Death Penalty Cases Involving Minors*, 10 Juvenile Justice Update 1 (June/July 2004) 30

Drizin, Steven A. & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. Rev. 891 (2004) 32, 33

Duncan, Martha Grace, *"So Young and So Untender": Remorseless Children and the Expectations of the Law*, 102 Colum. L. Rev. 1469 (2002) 33

Erikson, Erik H., *Identity: Youth and Crisis* (1968) 26

Fagan, Jeffrey, *Contexts of Choice by Adolescents in Criminal Events*, in *Youth On Trial: A Developmental Perspective on Juvenile Justice* 371 (Thomas Grisso & Robert G. Schwartz eds., 2000) 25

Fagan, Jeffrey & Valerie West, *The Decline of the Juvenile Death Penalty: Scientific Evidence of Evolving Norms*, J. Crim. L. & Criminology (forthcoming Winter 2004) 45, 46

Giedd, Jay N., et al., *Brain Development During Childhood and Adolescence: A Longitudinal MRI Study*, 2 Nature Neurosci. 861 (1999) 23

Gogtay, Nitin, et al., *Dynamic Mapping of Human Cortical Development During Childhood Through Early Adulthood*, 101 Proc. Nat'l Acad. Sci. 8174 (2004) 22

Goldberg, Elkhonon, *The Executive Brain: Frontal Lobes and the Civilized Mind* (2001) 20, 21, 22, 23

Graham, Sandra & Brian S. Lowery, *Priming Unconscious Racial Stereotypes About Adolescent Offenders*, 28 L. & Hum. Behav. (forthcoming 2004) 31

TABLE OF AUTHORITIES—Continued

Page

Halpern-Felsher, Bonnie L. & Elizabeth Cauffman, *Costs and Benefits of a Decision: Decision-making Competence in Adolescents and Adults*, 22 Applied Dev. Psych. 257 (2001) 17, 20

Kazdin, Alan E., *Adolescent Development, Mental Disorders, and Decision Making of Delinquent Youths*, in *Youth On Trial: A Developmental Perspective on Juvenile Justice* 33 (Thomas Grisso & Robert G. Schwartz eds., 2000) 25

Larson, Reed, et al., *Mood Variability and the Psychosocial Adjustment of Adolescents*, 9 J. Youth & Adolescence 469 (1980) 19

Lewis, Dorothy Otnow, et al., *Neuropsychiatric, Psychoeducational, and Family Characteristics of 14 Juveniles Condemned to Death in the United States*, 145 Am. J. Psych. 584 (1988) 28

McGivern, Robert F., et al., *Cognitive Efficiency on a Match to Sample Task Decreases at the Onset of Puberty in Children*, 50 Brain & Cognition 73 (2002) 22

Moffitt, Terrie E., *Adolescence-Limited and Life-Course-Persistent Antisocial Behavior: A Developmental Taxonomy*, 100 Psych. Rev. 674 (1993) 17, 25

Moll, Jorge, et al., *Frontopolar and Anterior Temporal Cortex Activation in a Moral Judgment Task*, 59 Arq. Neuropsiquiatr 657 (2001) 21

Moll, Jorge, et al., *The Neural Correlates of Moral Sensitivity: A Functional Magnetic Resonance Imaging Investigation of Basic and Moral Emotions*, 22 J. Neurosci. 2730 (2002) 21

Nurmi, Jari-Erik, *How Do Adolescents See Their Future?: A Review of the Development of Future Orientation and Planning*, 11 Dev. Rev. 1 (1991) 18

TABLE OF AUTHORITIES—Continued

Page

Office of Juvenile Justice and Delinquency Prevention, U.S. Dep't of Justice, OJJDP Statistical Briefing Book, *available at* www.ojjdp.ncjrs.org/ojstatbb/crime/qa05301.asp?qaDate=20030531 (last visited July 19, 2004) 17

Pfefferbaum, Adolf, et al., *A Quantitative Magnetic Resonance Imaging Study of Changes in Brain Morphology from Infancy to Late Adulthood*, 51 Archives of Neurology 874 (1994) 23

Redlich, Alison D. & Gail S. Goodman, *Taking Responsibility for an Act Not Committed: The Influence of Age and Suggestibility*, 27 L. & Hum. Behav. 141 (2003) 33

Scott, Elizabeth S., & Laurence Steinberg, *Blaming Youth*, 81 Tex. L. Rev. 799 (2003) 18, 25, 26, 27

Sherman, Rorie, *Juvenile Judges Say: Time to Get Tough*, Nat'l L.J., Aug. 8, 1994, at A1 47

Snyder, Howard N. & Melissa Sickmund, National Center for Juvenile Justice, *Juvenile Offenders and Victims: 1999 National Report* (1999) 26, 43

Sowell, Elizabeth R., et al., *In Vivo Evidence for Post-Adolescent Brain Maturation in Frontal and Striatal Regions*, 2 Nature Neurosci. 859 (1999) 20, 21, 22, 23

Sowell, Elizabeth R., et al., *Mapping Continued Brain Growth and Gray Matter Density Reduction in Dorsal Frontal Cortex: Inverse Relationships During Postadolescent Brain Maturation*, 21 J. Neurosci. 8819 (2001) 22

Spear, L.P., *The Adolescent Brain and Age-Related Behavioral Manifestations*, 24 Neurosci. & Biobehav. Rev. 417 (2000) 16

TABLE OF AUTHORITIES—Continued

Page

Steinberg, Laurence & Elizabeth S. Scott, *Less Guilty By Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 Am. Psychologist 1009 (2003) ..... *passim*

Steinberg, Laurence & Robert G. Schwartz, *Developmental Psychology Goes to Court*, in *Youth On Trial: A Developmental Perspective on Juvenile Justice* 27 (Thomas Grisso & Robert G. Schwartz eds., 2000) 26, 27, 31

Streib, Victor, *The Juvenile Death Penalty Today: Death Sentences and Executions for Juvenile Crimes, January 1, 1973 - June 30, 2004* (2004), *available at* www.law.onu.edu/faculty/streib/JuvDeathJune302004NewTables.pdf..... *passim*

Tanenhaus, David S. & Steven A. Drizin, *"Owing to the Extreme Youth of the Accused": The Changing Legal Response to Juvenile Homicide*, 92 J. Crim. L. & Criminology 641 (2002)..... 43

Torbet, Patricia, et al., National Center for Juvenile Justice, *State Responses to Serious and Violent Juvenile Crime: Research Report* (1996)..... 43

Waterman, Alan S., *Identity Development from Adolescence to Adulthood: An Extension of Theory and a Review of Research*, 18 Dev. Psych. 341 (1982)..... 26

Youth Violence: A Report of the Surgeon General (2001)..... 43

Zimring, Franklin E., *American Youth Violence* (1998)..... 43

Zimring, Franklin E., *Penal Proportionality for the Young Offender: Notes on Immaturity, Capacity, and Diminished Responsibility*, in *Youth on Trial: A Developmental Perspective on Juvenile Justice* 271 (Thomas Grisso & Robert G. Schwartz eds., 2000) 19, 25, 26

IN THE

Supreme Court of the United States

No. 03-633

DONALD P. ROPER, SUPERINTENDENT,
POTOSI CORRECTIONAL CENTER,

Petitioner,

v.

CHRISTOPHER SIMMONS,

Respondent.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF MISSOURI

BRIEF FOR RESPONDENT

STATEMENT OF THE CASE

The Crime and the Trial. On September 9, 1993, fishermen discovered the body of a woman, later identified as Shirley Crook, floating in the Meramec River, in St. Louis County, Missouri. TT 677-679.[1] Mrs. Crook's arms and legs had been bound and her face covered with a towel and duct tape. TT 687-688. The medical examiner determined that the cause of death was drowning. TT 752.

The following day, after learning that Christopher Simmons and his friend Charles Benjamin may have been involved in the crime, police arrested Simmons, a 17-year-old high-school junior with no previous criminal convictions, at

[1] The trial transcript is cited as "TT." The transcript of the hearing on Simmons' motion to suppress his confession is cited as "MST." The transcript of the hearing on Simmons' motion for post-conviction relief under Missouri Supreme Court Rule 29.15 is cited as "HT."

his school. TT 888-889, 922. Simmons was taken to the police station, where he waived his *Miranda* rights and was interrogated. TT 923, 927-928. Simmons initially denied involvement in the crime. TT 930. After nearly two hours of interrogation, during which police accused him of lying, falsely told him that Benjamin had confessed, and explained that he might face the death penalty a[illegible] that it would be in his interest to cooperate, Simmons began to cry and asked to speak to one of the detectives alone. TT 930-948.

Simmons told the detective that, in the early morning of September 9, he and Benjamin met at the house of Brian Moomey, an adult friend of both Simmons and Benjamin. After trying and failing to wake Moomey, Simmons and Benjamin went to Mrs. Crook's house, planning to burglarize it. TT 899-900; MST 26-27. The two gained entry through an open window at the back of the house. Their entrance woke Mrs. Crook, who sat up in bed and asked, "Who is there?" TT 900-901; MST 27-28. Simmons recognized Mrs. Crook as someone with whom he had been involved in a minor car accident immediately after receiving his driver's license. TT 901-902; MST 28. Believing that Mrs. Crook had also recognized him, Simmons "panicked." MST 28. He and Benjamin took Mrs. Crook out of bed, bound her, put her in the back of her mini-van, and drove to Castlewood State Park in St. Louis County, where Simmons pushed her from a railroad trestle into the Meramec River. TT 902-906; MST 29-31. Asked if he would re-enact the crime on videotape, Simmons agreed; he accompanied the police to Castlewood State Park, where he demonstrated for the camera where he and Benjamin had parked the mini-van and where Mrs. Crook had been pushed from the trestle. TT 907-909.

Simmons was tried as an adult for first-degree murder.[2] At trial, in addition to the testimony of the detective to whom Simmons had confessed, the State presented the testimony of several other witnesses, including Brian Moomey, John Tessmer (a friend of Simmons), and Christie Brooks (a neighbor).

[2] Because Simmons was 17 at the time of the crime, under Missouri law he was outside the jurisdiction of the juvenile court and was automatically tried as an adult. *See* Mo. Rev. Stat. §§ 211.021, 211.031.

Moomey—a 29-year-old who had served a prison sentence for burglary and assault—testified that he had a party at his house "every night" at which he drank until he passed out. TT 842-843, 845. A group of neighborhood teenagers, often including Simmons, Benjamin, and Tessmer, attended these "parties." TT 837-838. Moomey explained that the teenagers wanted to come to his house "because most of them get picked on [b]y their parents," and that they mowed his lawn, cleaned his house and car, and gave him rides in return for being allowed to "hang out" with him. TT 843-844. The teenagers called themselves the "Thunder Cats," and referred to Moomey as "Thunder Dad"; Tessmer, a 16-year-old whom Moomey considered his "best friend," was the "Number One Thunder Cat." TT 846-847.

Moomey claimed that, at one of the nightly parties at his house before the murder, he had heard Simmons, Benjamin, and Tessmer discussing a plan to burglarize a house and kill the occupants, and that Simmons had told the others that "they could do it and not get charged for it because they are juveniles." TT 839-840.[3] Moomey also alleged that, on the evening of September 9, Simmons had come to Moomey's house and told him that he had killed Mrs. Crook because she had seen his face. TT 841-842. Moomey admitted that, after this conversation, he failed to contact the police until he was told they had his name and wanted to talk to him (TT 855), and that he was concerned about testifying because he believed he was being investigated in connection with the murder (TT 872-873).

[3] Although the State contended, and Moomey testified, that Moomey related this alleged conversation planning the crime to the detectives who interviewed him (TT 874), the State stipulated that no reference to the conversation appeared in the videotaped portion of Moomey's initial interview with the police on September 10, or in the police report of that interview (TT 860-861).

John Tessmer, Moomey's 16-year-old "best friend," testified that, in the days leading up to the crime, Simmons had told him of a plan to rob and murder a male neighbor, and had asked him to meet Simmons and Benjamin at Moomey's house to carry out that plan. TT 968, 972. Tessmer testified that he in fact met Simmons and Benjamin at Moomey's house on the morning of September 9, before the crime was committed, but left and went home soon after Simmons and Benjamin arrived. TT 972-973. Based on his role in the offense, Tessmer—who at the time of trial had already been in juvenile custody for threatening to kill a woman and on juvenile probation for burglary (TT 980)—was charged as a juvenile with conspiracy to commit murder (TT 982-983). The charges against Tessmer were dismissed when he agreed to testify against Simmons. *Id.*

Christie Brooks, a neighbor of Simmons, corroborated Tessmer's account that Simmons had a plan to burglarize the male neighbor's house, but not the supposed plan to murder him. She testified that Simmons had also told her about the planned burglary, but that he did not mention any plan to commit murder. TT 825-826, 830.

The defense presented no witnesses. After a closing argument in which the prosecutor exhorted the jury not to let Simmons "use his age as a shield to protect him" (TT 1017), the jury found Simmons guilty of first-degree murder.

In the penalty phase, the State presented the testimony of Mrs. Crook's family about the effect of the crime. TT 1071-1095. The defense presented evidence that Simmons had no juvenile charges or adjudications and no prior adult criminal convictions (TT 1097-1098), along with brief testimony from Simmons' parents, his two young half-brothers, and two friends describing their loving relationships with him and various kind acts he had performed (TT 1098-1124). In closing argument, Simmons' counsel contended that Simmons' kind acts, his lack of any prior criminal history, and his age at the time of the crime were mitigating factors that counseled against the death penalty. TT 1147-1149. In response, the State argued that Simmons' age was "quite the

contrary" of mitigating (TT 1156-1157): "Seventeen years old. Isn't that scary? Doesn't that scare you? Mitigating? Quite the contrary I submit. Quite the contrary."

The jury found three statutory aggravating factors: that the murder "was committed for the purpose of receiving money"; that the murder "was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest of the defendant"; and that the murder "involved depravity of mind" and was "outrageously and wantonly vile, horrible, and inhuman" because Mrs. Crook was bound before she was killed. TT 1163-1164.[4] It recommended a sentence of death (TT 1163), and the judge imposed that sentence (TT 1181).

Post-Conviction Proceedings. Now represented by new counsel, Simmons filed a motion in the trial court, pursuant to Missouri Supreme Court Rule 29.15, to set aside his conviction and sentence. Simmons alleged, among other things, ineffective assistance of trial counsel at the guilt and sentencing phases. An evidentiary hearing was held on the motion; the testimony at that hearing, from psychologists who had examined Simmons, his trial counsel, and his friends and neighbors, sheds light on Simmons' developmental history, his maturity at the time of the crime, and his ability to assist in his own defense.

Dr. Robert Smith, an expert clinical psychologist retained by Simmons' post-conviction counsel (HT 25), testified regarding his psychological evaluation of Simmons. Based on his evaluation, Dr. Smith characterized Simmons as an adolescent who was "very immature" (HT 132, 157), "very impulsive" (HT 137), and "very susceptible to being manipulated or influenced" (HT 211). Dr. Daniel Cuneo, who

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[4] *See* Mo. Rev. Stat. § 565.032. The jury had been instructed to consider those three aggravating factors, in addition to the aggravating factor that the murder was committed during a burglary. TT 1124-1125. The jury was also instructed to consider two statutory mitigating factors—Simmons' lack of significant history of prior criminal activity, and Simmons' age at the time of the offense—along with Simmons' "kind acts . . . for his family and friends," and any other mitigating circumstances. TT 1127.

had previously evaluated Simmons at the request of his trial lawyers,[5] also viewed him as immature. As Dr. Cuneo explained, the tests he conducted showed a person who "is often naive or childlike," and who, when "placed under stress, . . . gets easily frustrated." HT 734. "When he turns that frustration inward, he becomes depressed and there may be periodic suicide attempts. . . . When he turns it outward, he may strike out at others." HT 735.

Dr. Smith believed that Simmons' "extremely dysfunctional home environment" (HT 110) contributed to and exacerbated these characteristics, making the normal adolescent developmental stages particularly difficult for him (HT 144-147). Simmons' parents had separated before his birth, and both had remarried; he lived primarily with his natural mother, Cheryl Hayes, and stepfather, Bob Hayes. Bob Hayes, an alcoholic (HT 74, 112-113), was a neglectful and abusive parent. "[T]here were frequent arguments and fights, particularly when Mr. Hayes was drinking heavily. . . . [H]is verbal behavior was extremely abusive." HT 118. Hayes acknowledged to Dr. Smith that he also abused Simmons physically, hitting him, chasing him out the door, throwing things at him, or pinning him against the wall (HT 76-77, 126, 589-590), as the testimony of several of Simmons' friends and neighbors in the post-conviction hearing confirmed (HT 226, 249-250, 270-273, 311-312). Cheryl Hayes stood by and did not attempt to intervene during these incidents. HT 590.

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[5] Dr. Cuneo testified at the post-conviction hearing that he had conducted only limited interviews with Simmons' family. He was unaware of much of the developmental history that Dr. Smith elicited, including Simmons' dysfunctional home environment and his drug and alcohol abuse, and he believed that, had he known that history, it would have been significant to his evaluation. HT 693-713. Based on the more limited and incomplete evaluation of Simmons he was able to conduct, Dr. Cuneo concluded that Simmons was sane at the time of the offense and competent to stand trial (HT 729), but that his psychological condition was potentially mitigating (HT 738). After discussing Dr. Cuneo's initial findings with him, Simmons' trial counsel chose not to have Dr. Cuneo complete his evaluation and not to have him testify. HT 741-742.

Dr. Smith testified that he had reviewed Simmons' school records, which showed that Simmons was an average student until adolescence (HT 42), when his grades "plummeted" (HT 147) and there was a "dramatic change in his behavior" (HT 208). During this period, his behavior in school was immature and "very impulsive"; "he would act without considering the consequences." HT 137-138.

Simmons' adolescent school difficulties were compounded by a growing substance abuse problem. As a young teenager, he began "resort[ing] to alcohol and drugs," primarily marijuana, in an attempt to "cope with [his] dysfunctional environment." HT 208. By age 17, he was routinely skipping school to use drugs and alcohol, drinking to intoxication several times a week, and consuming four to five marijuana "joints" a day. HT 194. As an adolescent, Simmons began to escape his home, and the stepfather he feared, by running away to friends' houses—sometimes for weeks at a time, as one of those friends testified. HT 312-315.

Dr. Smith explained that as Simmons spent less time at home and school, he spent more and more time with a group of his peers who also abused drugs and alcohol. HT 145-147. Along with other teenagers in that group, Simmons also began to spend time with Brian Moomey. One member of the group testified that Moomey provided them with alcohol and smoked marijuana with them. HT 320-322.[6] Dr. Smith believed that Simmons' immaturity and his dependence on drugs and alcohol rendered him "very susceptible to being manipulated or influenced" in a relationship with a powerful figure who supplied him with those substances (HT 211), and

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[6] Notwithstanding the trial testimony that the youths in the group referred to Moomey as "Thunder Dad" (TT 847), Simmons' trial lawyer, David Crosby, explained that Moomey was hardly an "ideal father figure" (HT 384). Specifically, Crosby testified that it was the "talk in the neighborhood" that Moomey had young men "commit crimes for him" in return for allowing them to "drink in his house and . . . [do] drugs there." HT 383. Crosby also testified that Simmons had told him that Moomey "had helped plan" Simmons' crime. HT 433.

that Moomey was such a figure for Simmons (HT 491, 555). Dr. Cuneo also believed that Moomey—whom he characterized as the neighborhood "Fagin"—had significant influence over Simmons and the other teenagers who congregated at his house. HT 714-715, 724.[7]

Dr. Smith concluded that Simmons' "immaturity" and adolescent behaviors, along with his history of abuse and substance dependence, and evidence of a personality disorder,[8] "would influence his expression of aggression, his judgment, and . . . would play a very significant role in his commission of the offense." HT 212. He believed that, due to these factors, Simmons' "ability to completely appreciate and understand what he was doing and the consequences would have been diminished." HT 546.

Dr. Smith noted that Simmons' behavior continued to be "very immature" and impulsive when he was in jail awaiting trial; Simmons "acted out in a lot of very immature and inappropriate ways, very adolescent kinds of behavior," and at one point attempted suicide. HT 133, 157. Dr. Smith believed that Simmons' immaturity and psychological problems impaired his ability to assist his lawyers in preparing for trial. HT 445. David Crosby, Simmons' trial lawyer, confirmed that Simmons "didn't assist me greatly in the preparation of the case." HT 398. For instance, Simmons initially denied the abuse by his stepfather and minimized his own use of drugs and alcohol. HT 371-373, 398. Crosby also ob-

[7] Marie Clark, a psychologist and mitigation specialist who prepared a social history for Simmons, also noted his general susceptibility to influence. She commented that he has a "tendency to follow other people and go along with whatever program he feels is appropriate or he feels the other person has." HT 627. "He tended to be a kid who tried to fit in and in doing so, made poor choices in terms of his friendships at times, in order to try to fit in." HT 655.

[8] Based on his evaluation of psychological tests administered to Simmons, which included tests not available to Dr. Cuneo, and the symptoms Simmons displayed, Dr. Smith diagnosed Simmons with schizotypal personality disorder. HT 172. Based on the more limited information available to him, Dr. Cuneo had tentatively diagnosed Simmons with borderline personality traits. HT 719.

served that Simmons neither understood the legal process nor appeared fully to comprehend that he was facing the death penalty: "I don't think [the possibility of the death penalty] really ever sunk in with Chris." HT 399-401.[9]

The trial court found that the evidence Simmons presented did not rise to the level of a violation of the Sixth Amendment right to counsel, and denied Simmons' Rule 29.15 motion. Simmons appealed his conviction and sentence and the denial of post-conviction relief to the Missouri Supreme Court, which affirmed. *See State* v. *Simmons*, 944 S.W.2d 165 (Mo. 1997). Simmons' federal habeas petition under 28 U.S.C. § 2254 was likewise unsuccessful. *See Simmons* v. *Bowersox*, 235 F.3d 1124 (8th Cir. 2001).

State Habeas Proceedings. In 2002, Simmons sought a writ of habeas corpus from the Missouri Supreme Court, contending that the juvenile death penalty violated the Federal and Missouri Constitutions' prohibition on cruel and unusual punishment. Relying on *Atkins* v. *Virginia*, 536 U.S. 304 (2002), the Missouri Supreme Court held that the evolving standards of decency embodied in the Eighth Amendment to the Federal Constitution barred execution of juvenile offenders, and granted the writ. JA 134.

SUMMARY OF ARGUMENT

Punishment is "cruel and unusual" within the meaning of the Eighth Amendment either if there is a general societal consensus against its imposition, or if it affronts "the basic concept of human dignity at the core of the Amendment" because it is disproportionate to the moral culpability of the offender. *Gregg* v. *Georgia*, 428 U.S. 153, 182 (1976) (opinion of Stewart, J.); *see also, e.g., Atkins* v. *Virginia*, 536 U.S.

[9] Dr. Cuneo also believed that Simmons' immaturity prevented him from making thoughtful decisions about his situation as a defendant. He noted that Simmons had been offered the chance to plead guilty in return for a life sentence and had rejected that option despite Dr. Cuneo's advice to accept. HT 729. Dr. Cuneo commented: "Mr. Simmons was seventeen years old. When I asked Mr. Simmons—at one point and this is typical for seventeen, he was rather unrealistic. 'If I get more than ten years, I don't know if I could put up with it. Suicide would be an option.'" HT 730.

304, 312 (2002). Each of these basic Eighth Amendment principles "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Trop* v. *Dulles*, 356 U.S. 86, 101 (1958) (plurality).

This Court first considered the constitutionality of the death penalty for 16- and 17-year-old offenders in 1989. *See Stanford* v. *Kentucky*, 492 U.S. 361 (1989). In the 15 years since that decision, advances in the scientific understanding of adolescent development, and the consistent movement by legislatures and juries away from imposition of death on juvenile offenders,[10] have demonstrated that capital punishment of those under 18 is inconsistent with our society's evolving standards of decency. The execution of juvenile offenders—like that of mentally retarded offenders, *see Atkins*, 536 U.S. at 321—is both disproportionate to their personal moral culpability and contrary to national and worldwide consensus.

First, research in developmental psychology and neurology over the last 15 years has confirmed that 16- and 17-year-olds differ from adults in ways that both diminish their culpability and impair the reliability of the sentencing process. Adolescents of that age are less able than adults to weigh risks and benefits, less able to envision the future and apprehend the consequences of their actions, and less able to control their impulses. Indeed, the parts of the brain that enable impulse control and reasoned judgment are not yet fully developed in 16- and 17-year-olds. For those reasons, they are not the "fully rational, choosing agent[s]" presupposed by the death penalty. *Thompson* v. *Oklahoma*, 487 U.S. 815, 825 n.23 (1988) (plurality).

More broadly, the very nature of adolescence means that adolescents are less blameworthy than adults. By virtue of their developmental deficits and their legal minority, adolescents are inherently less able to resist the influence of peers and environment; they lack the control over themselves and over their lives that adults possess, and are therefore not as fully responsible for their own actions as adults. Moreover, the defining feature of adolescence is that the self is still unformed; in a very real sense, 16- and 17-year-olds are not yet the people they will ultimately become. Adolescents' vulnerability and unformed nature preclude a reliable determination that death is a fit response to their personal culpability and character.

[10] For purposes of this brief, "juvenile offenders" refers to 16- and 17-year-old offenders.

The maturity of individual 16- and 17-year-olds, of course, varies. But because of their developmental deficits and their inherent changeability, the case-by-case consideration that suffices for adults cannot provide the reliable assessment of character and culpability that the Eighth Amendment demands. The rapid pace of change during adolescence means that a jury evaluating an adolescent defendant at sentencing cannot assess with any certainty that defendant's maturity and moral responsibility at the time of the crime. Nor can the death penalty reliably be a "reasoned moral response" to the still-unsettled character of an adolescent. *California* v. *Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring). For these and other reasons, permitting adolescents to be exposed to the death penalty creates a constitutionally intolerable "risk of wrongful execution." *Atkins*, 536 U.S. at 320.

Second, over the last 15 years, our nation has witnessed a "general legislative rejection" of the death penalty for juvenile offenders. *Stanford*, 492 U.S. at 381 (O'Connor, J., concurring in part and in the judgment). "A clear national consensus" now repudiates that punishment. *Id.* at 381-382. Since *Stanford*, seven additional states and the federal government have expressly set the minimum age for the death penalty at 18, and not one state has lowered the minimum age for the death penalty. Just as in *Atkins*, 31 jurisdictions and the federal government now expressly prohibit the death penalty for juvenile offenders. Even among states that theoretically permit the execution of juvenile offenders, just three have actually conducted such executions in the last 10 years. And in the last several years, death sentences

for juveniles—always unusual—have shown a dramatic, and statistically significant, decline. Both executions and death sentences imposed on juvenile offenders are now exceedingly rare—sufficiently rare that they are "cruel and unusual in the same way being struck by lightning is cruel and unusual." *Furman* v. *Georgia*, 408 U.S. 238, 309 (1972) (Stewart, J., concurring). And the handful of United States jurisdictions that continue to impose the death penalty on juvenile offenders now stand alone in a world that has almost universally set its face against that punishment.

ARGUMENT

Fifteen years ago, when this Court first addressed the constitutionality of the death penalty for 16- and 17-year-old offenders, it concluded that there was not yet sufficient evidence that the practice contravened Eighth Amendment standards of decency. *See Stanford* v. *Kentucky*, 492 U.S. 361, 380 (1989) (plurality); *id.* at 381-382 (O'Connor, J., concurring in part and in the judgment). On the same day in 1989, the Court determined that then-current standards of decency did not prohibit execution of the mentally retarded. *See Penry* v. *Lynaugh*, 492 U.S. 302 (1989). But the Eighth Amendment's prohibition on cruel and unusual punishments "is not static"; rather, it "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Trop* v. *Dulles*, 356 U.S. 86, 101 (1958) (plurality).

Accordingly, in 2002, when the Court revisited *Penry*'s holding, it held that the evolution in our society's standards of decency since 1989 required a different result. *See Atkins* v. *Virginia*, 536 U.S. 304, 321 (2002). The Court found that "[b]ecause of their disabilities in areas of reasoning, judgment, and control of their impulses," the mentally retarded do not "act with the level of moral culpability that characterizes the most serious adult criminal conduct," and that those same disabilities "can jeopardize the reliability and fairness of capital proceedings" against them. *Id.* at 306-307. Moreover, "[p]resumably for these reasons," the "deliberations" of "the American public, legislators, scholars, and judges"

since *Penry* reflected an emerging consensus against the execution of the mentally retarded. *Id.* at 307.

As the Missouri Supreme Court recognized, equally powerful evidence of evolution in our society's standards of decency is present here. In the 15 years since *Stanford*, scientific research has confirmed that 16- and 17-year-olds, as a class, have not yet fully developed the capacities for reasoning, judgment, and control that are necessary to act with the level of culpability justifying the ultimate punishment. And these developmental deficits, along with the changeability that is intrinsic to adolescence, seriously impair the reliability and fairness of capital proceedings against juvenile offenders. Concomitantly, since *Stanford*, a national—and, indeed, worldwide—consensus has developed against the execution of offenders under the age of 18. For both these reasons, the execution of juvenile offenders violates the standards of decency that obtain today.

As *Atkins* demonstrates, *stare decisis* is no bar to reconsideration of the holding in *Stanford*. Petitioner's argument to the contrary (Br. 14-15) simply fails to acknowledge that the standards of decency embodied in the Eighth Amendment evolve "as public opinion becomes enlightened by a humane justice." *Weems* v. *United States*, 217 U.S. 349, 378 (1910). The very nature of the Eighth Amendment accordingly requires that the principle of *stare decisis* yield—as it did in *Atkins*—to compelling evidence that society's values have changed. Because such compelling evidence is present in this case, the judgment of the Missouri Supreme Court should be affirmed.[11]

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[11] Because the Court has granted certiorari on the underlying question whether the execution of juvenile offenders violates the Eighth Amendment, and because it may affirm the Missouri Supreme Court's judgment on any ground, *see, e.g.*, *Thigpen* v. *Roberts*, 468 U.S. 27, 30 (1984), it need not address the first question raised by petitioner (Br. i, 11-14)—whether the Missouri Supreme Court erred in concluding that subsequent developments had undermined *Stanford* before this Court itself addressed the question. Even if lower courts are not free to assess evolving standards of decency for themselves where there is a prior—but outdated—Supreme Court decision on the question presented, this Court is

I. THE EXECUTION OF JUVENILE OFFENDERS VIOLATES THE EIGHTH AMENDMENT'S REQUIREMENT THAT DEATH MUST BE PROPORTIONATE TO THE OFFENDER'S PERSONAL CULPABILITY.

The Eighth Amendment requires that the "punishment for crime . . . be graduated and proportioned to the offense." *Atkins*, 536 U.S. at 311 (quoting *Weems*, 217 U.S. at 367). When the punishment is death, that extreme sanction must fit not only the crime, but also the offender: a death sentence must be "directly related to the personal culpability of the criminal defendant." *Franklin* v. *Lynaugh*, 487 U.S. 164, 184 (1988) (O'Connor, J., concurring in the judgment); *see also Tison* v. *Arizona*, 481 U.S. 137, 149 (1987); *Woodson* v. *North Carolina*, 428 U.S. 280, 304 (1976). The death penalty thus may not be imposed on those whose "crimes cannot be said to have reflected a consciousness materially more 'depraved' than that of any person guilty of murder," *Godfrey* v. *Georgia*, 446 U.S. 420, 433 (1980), but must be reserved for "a narrow category" of the most culpable offenders, *Atkins*, 536 U.S. at 319. This Court has accordingly held that, because certain classes of defendants cannot reliably be said to fall within that narrow category, they warrant a categorical exemption from the death penalty. *See, e.g., id.* at 321; *Thompson* v. *Oklahoma*, 487 U.S. 815, 838 (1988) (plurality) (those under the age of 16); *Ford* v. *Wainwright*, 477 U.S. 399, 409-410 (1986) (the insane).

Most recently, this Court held in *Atkins* that, in light of the constitutional command that only "the most deserving" may be executed, the mentally retarded could not constitutionally be sentenced to death. 536 U.S. at 319. Although the mentally retarded "frequently know the difference between right and wrong and are competent to stand trial," they are less blameworthy because they have "diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others"; they "act on impulse"; and they are likely to be influenced by others. *Id.* at 318. Moreover, due to those same deficiencies, "mentally retarded defendants in the aggregate face a special risk of wrongful execution," and case-by-case consideration of mental retardation as a mitigating factor cannot ensure that death sentences will be proportionate to their personal culpability. *Id.* at 321. As discussed below, the same factors that *Atkins* held require the mentally retarded to be exempt from the death penalty also apply to 16- and 17-year-olds.

certainly free to reassess the constitutionality of the juvenile death penalty in light of the standards of decency that exist today, and to affirm the Missouri Supreme Court's judgment based on this Court's own assessment of that question. *See Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U.S. 477 (1989). In that case, the court of appeals had reached a judgment contrary to this Court's decision in *Wilko* v. *Swan*, 346 U.S. 427 (1953). Although the Court noted that the court of appeals should not have renounced *Wilko* "on its own authority," the Court itself chose to overrule *Wilko*, and therefore affirmed the court of appeals' judgment. *Rodriguez de Quijas*, 490 U.S. at 484-486.

A. Juvenile Offenders Lack The Capacity For Rational, Mature Judgment And For Controlling Their Conduct That Is A Predicate To Infliction Of The Death Penalty.

This Court has already recognized what ordinary experience and common sense tell us: compared to adults, 16- and 17-year-olds have a significantly diminished capacity for reasoned judgment, for understanding and appreciating the consequences of their choices, and for managing their emotions and controlling their behavior. "Our history is replete with laws and judicial recognition that minors . . . generally are less mature and responsible than adults. Particularly 'during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment' expected of adults. Even the normal 16-year-old customarily lacks the maturity of an adult." *Eddings* v. *Oklahoma*, 455 U.S. 104, 115-116 (1982) (quoting *Bellotti* v. *Baird*, 443 U.S. 622, 635 (1979)).[12] And, although juveniles' immaturity

[12] *See also, e.g., Johnson* v. *Texas*, 509 U.S. 350, 367 (1993) ("A lack of maturity and an underdeveloped sense of responsibility are found in youth

does not excuse their crimes, it mitigates their criminal culpability. As the *Thompson* plurality explained, "less culpability should attach to a crime committed by a juvenile than to a comparable crime committed by an adult," because "[i]nexperience, less education, and less intelligence make the teenager less able to evaluate the consequences of his or her conduct while at the same time he or she is much more apt to be motivated by mere emotion or peer pressure than an adult." 487 U.S. at 835; *see also Eddings*, 455 U.S. at 115 n.11. Research in developmental psychology and neurology over the last 15 years confirms that common-sense judgment—as to adolescents in general and 16- and 17-year-olds in particular.

Psychosocial Research. Perhaps the most striking evidence of adolescents' immature judgment and inadequate ability to control their impulses is their behavior. As any observer of teenagers would attest, adolescents "exhibit a disproportionate amount of reckless behavior, sensation seeking and risk taking" compared to adults.[13] Indeed, "reckless behavior [is] virtually a normative characteristic of adolescent development."[14] Adolescents' risky behavior frequently includes criminal activity—so much so that "it is statistically aberrant to refrain from crime during adolescence."[15] Both violent crimes and less serious offenses "peak sharply" in late adolescence and "drop precipitously in young adulthood."[16]

Adolescents are reckless at least in part because they do not perceive and evaluate the costs and benefits of their actions in the same way that adults do.[17] First, adolescents may simply fail to take adequate account of the potential consequences of their actions. One recent study comparing adolescent and adult decision-making found that when asked to evaluate hypothetical decisions, adolescents as old as 17 were less likely than adults to mention possible long-term consequences, to evaluate both risks and benefits, and to examine possible alternative options.[18] In addition, adolescents may weigh risks and benefits differently than adults would and are likelier to discount risks. Compared to adults, adolescents focus more on opportunity for gains, and less on protection against losses, in making decisions.[19]

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more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions."); *Hodgson* v. *Minnesota*, 497 U.S. 417, 458-459 (1990) (O'Connor, J., concurring in part and concurring in the judgment in part) ("[M]inors often lack the ability to make fully informed choices that take account of both immediate and long-range consequences."); *id.* at 480, 482-483 (Kennedy, J., concurring in the judgment and dissenting in part) (noting "the qualitative differences in maturity between children and adults"); *Parham* v. *J.R.*, 442 U.S. 584, 603 (1979) ("Most children, even in adolescence, simply are not able to make sound judgments concerning many decisions.").

[13] L.P. Spear, *The Adolescent Brain and Age-Related Behavioral Manifestations*, 24 Neurosci. & Biobehav. Rev. 417, 421 (2000).

[14] Jeffrey Arnett, *Reckless Behavior in Adolescence: A Developmental Perspective*, 12 Dev. Rev. 339, 344 (1992).

[15] Terrie E. Moffitt, *Adolescence-Limited and Life-Course-Persistent Antisocial Behavior: A Developmental Taxonomy*, 100 Psych. Rev. 674, 685-686 (1993). That is not to say, of course, that serious violent crime is typical adolescent behavior. Rather, the increased incidence in adolescence of all kinds of reckless and criminal behavior—trivial and serious—is testimony to adolescents' diminished capacity for mature decision-making.

[16] *See id.* at 675 (noting that the "relationship between age and crime" obtains for "most types of crimes"); Arnett, *supra* note 14, at 343 (same); *see also* Office of Juvenile Justice and Delinquency Prevention, U.S. Dep't of Justice, OJJDP Statistical Briefing Book, *available at* www.ojjdp.ncjrs.org/ojstatbb/crime/qa05301.asp?qaDate=20030531 (last visited July 19, 2004) (statistics showing that arrests for serious violent crimes peak in late adolescence).

[17] *See, e.g.*, Arnett, *supra* note 14, at 350-353 (summarizing evidence that adolescents' poor capacity for assessing probabilities plays a role in their reckless behavior).

[18] *See* Bonnie L. Halpern-Felsher & Elizabeth Cauffman, *Costs and Benefits of a Decision: Decision-making Competence in Adolescents and Adults*, 22 Applied Dev. Psych. 257, 264-270 (2001) (comparing twelfth-graders with mean age of 17.5 to adults with mean age of 23).

[19] *See* Laurence Steinberg & Elizabeth S. Scott, *Less Guilty By Reason of Adolescence: Developmental Immaturity, Diminished Responsibil-*

Adolescents' more limited time horizons also impair their decision-making ability. By definition, adolescents have less life experience on which to draw.[20] Moreover, adolescents are less able than adults to project themselves into the future; the ability to envision and plan for the future is still developing during late adolescence.[21] Adolescents' greater uncertainty about their futures may lead them to "discount the future more than adults do and to weigh more heavily short-term consequences of decisions," impairing their ability to assess risks and to make mature judgments about their behavior.[22] Simply put, adolescents live for the present—and are less likely to appreciate the future consequences of their actions—because they are less able than adults to see beyond the present.

In addition, while the ability to regulate emotion is critical to achieving "adult levels of social maturity and the ability to show 'responsible' behavior,"[23] that ability has yet to mature fully during adolescence.[24] Adolescents are more

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ity, and the Juvenile Death Penalty, 58 Am. Psychologist 1009, 1012 (2003).

[20] *See, e.g.*, Arnett, *supra* note 14, at 351-352 (noting that adolescents' more limited life experience makes it less likely that they will fully apprehend possible negative consequences of their actions).

[21] *See, e.g.*, Jari-Erik Nurmi, *How Do Adolescents See Their Future?: A Review of the Development of Future Orientation and Planning*, 11 Dev. Rev. 1, 28-29 (1991) (the ability to plan for the future continues to develop until the early twenties); *see also* Elizabeth Cauffman & Laurence Steinberg, *(Im)maturity of Judgment in Adolescence: Why Adolescents May Be Less Culpable Than Adults*, 18 Behav. Sci. & L. 741, 748, 754 & tbl. 4 (2000) (in a study comparing maturity of judgment in adolescents and adults, finding that twelfth-graders with mean age of 17.5 scored lower than young adults on measures of "perspective," which encompassed "the ability to see short and long term consequences" as well as the extent to which one "take[s] other people's perspectives into account").

[22] Steinberg & Scott, *supra* note 19, at 1012.

[23] Ronald E. Dahl, *Affect Regulation, Brain Development, and Behavioral/Emotional Health in Adolescence*, 6 CNS Spectrums 60, 60 (2001).

[24] *See id.* at 61-62, 69; Elizabeth S. Scott & Laurence Steinberg, *Blaming Youth*, 81 Tex. L. Rev. 799, 815 (2003) (the capacity for self-

likely than adults to suffer from moodiness,[25] which may contribute to impulsive actions. And even late adolescents are less able than adults to control their impulses and exercise self-restraint in refraining from aggressive behavior.[26] "[T]he developing adolescent can only learn his or her way to fully developed control by experience. This process will probably not be completed until very late in the teen years. . . . [E]xpecting the experience-based ability to resist impulses and peers to be fully formed prior to age eighteen or nineteen would seem on present evidence to be wishful thinking."[27]

The ability to gauge risks and benefits accurately, the ability to envision the future, and the ability to resist impulses and control emotions—even in the face of environmental or peer pressures—are critical components of psychosocial maturity, necessary in order to make mature, fully reasoned decisions. Late adolescents have not fully developed these abilities and hence lack an adult's capacity for reasoned judgment.[28] "[I]t is clear that important progress

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direction and self-management is still developing during late adolescence); *see also Eddings*, 455 U.S. at 115 n.11 (adolescents are "more impulsive and less self-disciplined" than adults and have "less capacity to control their conduct") (internal quotation marks and citation omitted); *Thompson*, 487 U.S. at 835 (plurality) (an adolescent is "much more apt to be motivated by mere emotion . . . than an adult").

[25] *See* Reed Larson et al., *Mood Variability and the Psychosocial Adjustment of Adolescents*, 9 J. Youth & Adolescence 469, 488 (1980).

[26] *See* Cauffman & Steinberg, *supra* note 21, at 748-749, 754 & tbl. 4 (as compared to young adults, twelfth-graders scored significantly lower on measures of "temperance," which included "impulse control" and "suppression of aggression"); *see also* Steinberg & Scott, *supra* note 19, at 1013 (impulsivity increases in middle and late adolescence and declines in adulthood).

[27] Franklin E. Zimring, *Penal Proportionality for the Young Offender: Notes on Immaturity, Capacity, and Diminished Responsibility*, in *Youth on Trial: A Developmental Perspective on Juvenile Justice* 271, 280, 282 (Thomas Grisso & Robert G. Schwartz eds., 2000).

[28] *See, e.g.*, Cauffman & Steinberg, *supra* note 21, at 749, 754 tbl. 4 (compared to young adults, twelfth-graders score significantly lower on overall measures of psychosocial maturity); *see id.* at 756 (psychosocial

in the development of [psychosocial maturity] occurs some time during late adolescence, and that these changes have a profound effect on the ability to make consistently mature decisions."[29]

Neurological Research. Scientific advances in recent years, establishing that late adolescents' brains are still physically immature, provide new insight into their well-documented psychosocial immaturity.

Research using magnetic resonance imaging (MRI) technology to examine the development of the brain over time—something that was not possible until the 1990s—has shown that the frontal lobes of the brain, which govern the higher-order cognitive functions, are not yet fully developed in 16- and 17-year-olds. "As the seat of intentionality, foresight, and planning, the frontal lobes are the most uniquely 'human' of all the components of the human brain."[30] The frontal lobes, and particularly the area of the frontal lobes known as the prefrontal cortex, are often referred to as the "CEO" of the brain, in charge of the brain's "executive functions."[31] These regions of the brain are involved in nearly all "high-level cognitive tasks," especially those involving working memory.[32] They are central to the process of planning and decision-making,[33] including the evaluation of future

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maturity increases most dramatically between late adolescence and young adulthood, "sometime between 16 and 19 years").

[29] *Id.* at 758; *see also* Halpern-Felsher & Cauffman, *supra* note 18, at 271 ("[I]mportant progress in the development of decision-making competence occurs sometime during late adolescence.").

[30] Elkhonon Goldberg, *The Executive Brain: Frontal Lobes and the Civilized Mind* 23 (2001).

[31] *Id.* at 23-26.

[32] *E.g.*, Roberto Cabeza & Lars Nyberg, *Imaging Cognition II: An Empirical Review of 275 PET and fMRI Studies*, 12 J. Cognitive Neurosci. 1, 31 (2000).

[33] *See, e.g.*, Goldberg, *supra* note 30, at 24; Elizabeth R. Sowell et al., *In Vivo Evidence for Post-Adolescent Brain Maturation in Frontal and Striatal Regions*, 2 Nature Neurosci. 859, 860 (1999).

consequences and the weighing of risk and reward.[34] They are essential to the ability to control emotions and inhibit impulses.[35] And they have been tied to the ability to exercise moral judgment.[36] In short, fully developed and properly functioning frontal lobes play a critical role in a person's capacity to be a rational moral actor, capable of mature decision-making.

It is precisely this part of the brain that is not yet fully developed in late adolescence. During childhood and adolescence, the brain is maturing in two ways. First, the brain undergoes myelination: the neural pathways connecting different parts of the brain are insulated with white fatty tissue called "myelin."[37] That insulation "speeds the neural signal transmission," making "communication between different parts of the brain faster and more reliable."[38] Second, during that same period the brain is undergoing "pruning," the

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[34] *See* Antoine Bechara et al., *Characterization of the Decision-Making Deficit of Patients with Ventromedial Prefrontal Cortex Lesions*, 123 Brain 2189, 2198-2200 (2000) (showing that patients with lesions in the prefrontal cortex suffered from impairments in ability to make real-life decisions because of an insensitivity to future consequences, whether reward or punishment); Antoine Bechara et al., *Dissociation of Working Memory from Decision Making Within the Human Prefrontal Cortex*, 18 J. Neurosci. 428, 428, 434 (1998) (prefrontal cortex is necessary for decision-making in tasks involving evaluation of risk and reward).

[35] *See, e.g.*, Goldberg, *supra* note 30, at 141; Sowell et al., *In Vivo Evidence*, *supra* note 33, at 860; B.J. Casey et al., *Structural and Functional Brain Development and its Relation to Cognitive Development*, 54 Bio. Psych. 241, 244-246 (2000).

[36] *See* Jorge Moll et al., *The Neural Correlates of Moral Sensitivity: A Functional Magnetic Resonance Imaging Investigation of Basic and Moral Emotions*, 22 J. Neurosci. 2730, 2730, 2733-2736 (2002) (finding that prefrontal cortex "play[s] a central role in moral appraisals" and noting that patients with frontal-lobe dysfunction show "impaired socio-moral emotion and behavior" even when they know right from wrong); Jorge Moll et al., *Frontopolar and Anterior Temporal Cortex Activation in a Moral Judgment Task*, 59 Arq. Neuropsiquiatr 657, 661-663 (2001) (finding activation of prefrontal cortex during moral judgment tasks).

[37] *See, e.g.*, Goldberg, *supra* note 30, at 144.

[38] *Id.*

paring away of excess synapses, thought to lead to more efficient neural connections.[39] Overall, during adolescence, myelination and pruning contribute to an increase in the brain's "white matter"—the tissue that forms pathways among different parts of the brain—and a simultaneous decrease in "gray matter"—the neurons that are the building blocks of the brain.[40] This shift in the composition of the brain helps the brain work faster and more efficiently.[41]

Different parts of the brain mature at different rates; parts of the brain associated with more basic, instinctual functions mature sooner, while the frontal lobes, and particularly the prefrontal cortex, mature later.[42] The new MRI studies of the developing brain demonstrate that the shift from gray to white matter in these regions is still taking place in 16- and 17-year-olds. Recent studies have shown a "dramatic" rate of gray matter loss—associated with greater efficiency in cognitive tasks—in the frontal lobes "[b]etween adolescence and adulthood."[43] Studies also show that, during the same period, the volume of white matter continues to

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[39] *See, e.g.*, Robert F. McGivern et al., *Cognitive Efficiency on a Match to Sample Task Decreases at the Onset of Puberty in Children*, 50 Brain & Cognition 73, 74 (2002); Casey et al., *supra* note 35, at 242-243, 245-246.

[40] *See, e.g.*, Goldberg, *supra* note 30, at 27; Casey et al., *supra* note 35, at 243.

[41] *See, e.g.*, Casey et al., *supra* note 35, at 245-246 (noting that myelination and synaptic pruning "coincide with the continued development of cognitive capacities"); Elizabeth R. Sowell et al., *Mapping Continued Brain Growth and Gray Matter Density Reduction in Dorsal Frontal Cortex: Inverse Relationships During Postadolescent Brain Maturation*, 21 J. Neurosci. 8819, 8819, 8828 (2001).

[42] *See, e.g.*, Nitin Gogtay et al., *Dynamic Mapping of Human Cortical Development During Childhood Through Early Adulthood*, 101 Proc. Nat'l Acad. Sci. 8174, 8177 (2004); Casey et al., *supra* note 35, at 243.

[43] Sowell et al., *Mapping Continued Brain Growth*, *supra* note 41, at 8821; Sowell et al., *In Vivo Evidence*, *supra* note 33, at 860; Gogtay et al., *supra* note 42, at 8175 (in longitudinal study of brain development, finding that the prefrontal cortex "loses [gray matter] only at the end of adolescence").

increase,[44] consistent with findings that myelination continues at least until the early twenties, and the frontal lobes are the last region to myelinate.[45] Overall, the more detailed and precise picture of brain development obtained through MRI studies provides compelling evidence that the maturation of the frontal lobes—the part of the brain that is critical for competent decision-making, control of emotions, and moral judgment—is not complete at least until age 18.[46]

That adolescents' minds and brains are not yet fully developed mitigates their culpability. *See Thompson*, 487 U.S. at 835 (plurality); *Eddings*, 455 U.S. at 115 n.11. Because they have less ability to appreciate the full range of consequences attendant on their actions, to value costs and benefits appropriately, and to consider alternatives, adolescents have a "reduced capacity for considered choice." *Skipper* v. *South Carolina*, 476 U.S. 1, 13 (1986). And because they have a limited ability to handle their emotions and restrain their impulses, their conduct "deserve[s] less punishment." *Eddings*, 455 U.S. at 115 n.11 (internal quotation marks and citation omitted).

For the same reasons, the execution of adolescent offenders does not measurably further the legitimate purposes of punishment—retribution and deterrence. *See, e.g., Atkins*, 536 U.S. at 319. Adolescents are inherently less capable of being deterred by the prospect of an uncertain future punishment, because they are less able to project into the future, to envision the consequences of their actions, and to apprehend the relevance of an uncertain future cost. Moreover, deterrence is significant only when the offender in fact

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[44] *See, e.g.*, Adolf Pfefferbaum et al., *A Quantitative Magnetic Resonance Imaging Study of Changes in Brain Morphology from Infancy to Late Adulthood*, 51 Archives of Neurology 874, 881 (1994) (finding that cortical white matter increased steadily until age 20, after which it stabilized); Jay N. Giedd et al., *Brain Development During Childhood and Adolescence: A Longitudinal MRI Study*, 2 Nature Neurosci. 861, 861 (1999) (finding increase in white matter through age 22).

[45] *See, e.g.*, Sowell et al., *In Vivo Evidence*, *supra* note 33, at 859.

[46] *See* Goldberg, *supra* note 30, at 144.

conducts "the cold calculus that precedes the decision to act," *Gregg*, 428 U.S. at 186; adolescents' immature and impulsive decision-making process is not likely to be a "cold calculus" of risks and benefits. *See also Enmund* v. *Florida*, 458 U.S. 782, 799 (1982); *Thompson*, 487 U.S. at 837-838 (plurality). Just as with mentally retarded offenders, "the same cognitive and behavioral impairments that make these defendants less morally culpable . . . also make it less likely that they can process the information of the possibility of execution as a penalty and, as a result, control their conduct based upon that information." *Atkins*, 536 U.S. at 320. And, as discussed further below, because "the severity of the appropriate punishment necessarily depends on the culpability of the offender," *id.* at 319, retribution is also not well-served by imposing death on adolescents, whose reduced capacity to make considered judgments and control their actions mitigates their culpability.

B. The Death Penalty Is Not Commensurate With Juvenile Offenders' Personal Responsibility For Their Criminal Acts.

The very nature of adolescence makes the death penalty far less "directly related to the *personal* culpability" of the offender—and therefore to the death penalty's retributive purpose. *Tison*, 481 U.S. at 149 (emphasis added); *see Atkins*, 536 U.S. at 319. It is "constitutionally indispensable" that the death penalty fit the "character and record of the individual offender," *Woodson*, 428 U.S. at 304, and "reflect a reasoned moral response to the defendant's background, character, and crime," *Brown*, 479 U.S. at 545 (O'Connor, J., concurring); *see also Parker* v. *Dugger*, 498 U.S. 308, 321 (1991). Two qualities intrinsic to adolescence—its vulnerability, and its transience—are inconsistent with that constitutional standard.

First, as this Court has recognized, "youth is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage." *Eddings*, 455 U.S. at 115. Because of their developmental immaturity, adolescents are less able than

adults to resist the negative influences of their environment—and, indeed, are still the product of family and environment in a way that adults are not. "Adolescents are dependent on living circumstances of their parents and families and hence are vulnerable to the impact of conditions well beyond their control."[47] Both the family and the neighborhood in which an adolescent finds himself play a major role in juvenile delinquency.[48] Moreover, precisely because adolescents are legal minors, they lack the freedom and autonomy adults possess to remove themselves from external forces that exert pressure toward crime.[49]

Adolescents are also particularly "susceptible to pressure from their peers." *Lee* v. *Weisman*, 505 U.S. 577, 593 (1992). Pressure to conform socially and desire for peer approval, interacting with adolescents' developmental immaturity, can lead them to make unwise choices they would not be likely to make as adults.[50] Peer influence is particularly salient in juvenile crime, which is significantly correlated with exposure to delinquent peers.[51] A high proportion of juvenile crime (as compared to adult crime) takes place in groups and is at least partially the product of group dynamics. "No matter the crime [including homicide], if a teenager is the offender, he is usually not committing the offense

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[47] Alan E. Kazdin, *Adolescent Development, Mental Disorders, and Decision Making of Delinquent Youths*, in *Youth On Trial*, *supra* note 27, at 33, 47. As this Court has noted, "juveniles, unlike adults, are always in some form of custody. Children, by definition, are not assumed to have the capacity to take care of themselves. They are assumed to be subject to the control of their parents." *Schall* v. *Martin*, 467 U.S. 253, 265-66 (1984).

[48] *See* Kazdin, *supra* note 47, at 47-48; *see also* Jeffrey Fagan, *Contexts of Choice by Adolescents in Criminal Events*, in *Youth On Trial*, *supra* note 27, at 371, 371-394 (discussing coercive effect of social context on adolescents).

[49] *See, e.g.*, Scott & Steinberg, *supra* note 24, at 818.

[50] *See, e.g.*, Arnett, *supra* note 14, at 354-355.

[51] *See, e.g.*, Moffitt, *supra* note 15, at 687-688; Zimring, *supra* note 27, at 282.

alone."[52] Indeed, "[m]ost adolescent decisions to break the law take place on a social stage where the immediate pressure of peers is the real motive. . . . A necessary condition for an adolescent to stay law-abiding is the ability to deflect or resist peer pressure. Many kids lack this crucial social skill for a long time."[53]

The heightened vulnerability to external circumstances that is intrinsic to childhood and adolescence means that 16- and 17-year-olds do not have the same full share of personal responsibility for their actions that adults do. "[Y]outh crime as such is not exclusively the offender's fault; offenses by the young also represent a failure of family, school, and the social system, which share responsibility for the development of America's youth." *Eddings*, 455 U.S. at 115 n.11 (internal quotation marks and citation omitted).

Second, the death penalty cannot reliably be "a reasoned moral response" to an adolescent defendant's character, *Brown*, 479 U.S. at 545 (O'Connor, J., concurring), because the defining quality of adolescence is that character is not yet fully formed.[54] Adolescents are still in the process of forging an identity, a process that will not be complete at least until early adulthood.[55] And, because there is no way to know what that identity will ultimately be, it is impossible

[52] Zimring, *supra* note 27, at 281; *see also* Howard N. Snyder & Melissa Sickmund, National Center for Juvenile Justice, *Juvenile Offenders and Victims: 1999 National Report* 63 (1999) (in 1997, juveniles were twice as likely as adults to commit serious violent crimes in groups); *id.* at 56 (between 1980 and 1997, half of all juvenile homicide offenders committed the crime in a group).

[53] Zimring, *supra* note 27, at 280-281.

[54] *See generally* Erik H. Erikson, *Identity: Youth and Crisis* (1968).

[55] *See, e.g.*, Laurence Steinberg & Robert G. Schwartz, *Developmental Psychology Goes to Court*, in *Youth On Trial*, *supra* note 27, at 9, 27 ("[M]ost identity development takes place during the late teens and early twenties."); Alan S. Waterman, *Identity Development from Adolescence to Adulthood: An Extension of Theory and a Review of Research*, 18 Dev. Psych. 341, 355 (1982) ("The most extensive advances in identity formation occur during the time spent in college.").

to pass final judgment on the character of an adolescent offender.

Adolescents' lack of a coherent identity exacerbates their vulnerabilities. Without a consistent sense of himself as a person, an adolescent is much more likely than an adult to experiment with risky and criminal behavior; and he is much less likely to have the strength to resist the negative influence of a high-crime neighborhood or a delinquent peer group. Adolescent crime differs from adult crime because it is at least in part attributable to the inchoate nature of adolescence itself—which is by definition transient.[56] Adolescents change; and that changeability makes it virtually impossible to reach a reliable judgment that the crimes of a 16- or 17-year-old are the expression of a fixed and intractably malign criminal character.

Put another way, "the malleability of adolescence"[57] offers the prospect that an adolescent offender can alter his life course and develop a moral character as an adult. Executing a juvenile before he is a fully formed person and before we can reliably predict what sort of adult he will become forecloses the chance for this development and thus cannot be a reasoned moral response to the defendant's character.

C. Individualized Sentencing Of Juvenile Offenders Cannot Provide The Reliable Assessment Of Character And Culpability Required By The Constitution.

This Court has made clear that "there is some age below which a juvenile's crimes can never be constitutionally punished by death," and that the Constitution requires this

[56] *See, e.g.*, Scott & Steinberg, *supra* note 24, at 819-821 ("It is fair to assume that most adults who engage in criminal conduct act upon subjectively defined preferences and values, and that their choices can fairly be charged to deficient moral character. This cannot fairly be said of the crimes of typical juvenile actors, whose choices . . . are shaped by developmental factors that are constitutive of adolescence.").

[57] Steinberg & Schwartz, *supra* note 55, at 23.

Court to "locate this age" in light of Eighth Amendment principles. *Thompson*, 487 U.S. at 848 (O'Connor, J., concurring in the judgment); *see id.* at 828-829 (plurality). Indeed, petitioner concedes (Br. 33-34) that "[t]here is certainly a point at which age is an appropriate proxy for determining whether imposing capital punishment on an individual makes sense, even without legislation," and that juveniles under 16 are properly excluded from death eligibility. Petitioner contends, however (Br. 33), that because some 16- and 17-year-olds are more mature than others, a bright-line rule excluding them from death-eligibility is improper, and the Eighth Amendment is satisfied if juries are permitted to consider youth as a mitigating factor in each individual case.

Petitioner is wrong. To be sure, adolescents mature at different rates, and the abilities of 16- and 17-year-olds will vary from individual to individual, just as the abilities of the mentally retarded and juveniles under 16 vary.[58] But the alternative to a bright-line rule—permitting juries to decide,

[58] Although the abilities of 16- and 17-year-olds differ, those who commit capital crimes are likely to be among the least mature. Empirical studies of juveniles on death row have shown that this group generally suffers from an array of developmental deficits, as well as a history of abuse and deprivation. *See, e.g.*, Dorothy Otnow Lewis et al., *Neuropsychiatric, Psychoeducational, and Family Characteristics of 14 Juveniles Condemned to Death in the United States*, 145 Am. J. Psych. 584 (1988). And, although petitioner contends that Simmons was sufficiently mature to deserve death, nothing in the record indicates that his abilities exceeded those of the typical immature adolescent. To the contrary, the uncontradicted testimony of the psychologists who examined him was that Simmons was particularly immature, impulsive, and susceptible to influence. *See supra* pp. 5-8. Petitioner argues (Br. 35) that Simmons acted "deliberately" and that he recognized the possibility that he would be punished (although he misunderstood the potential punishment he could face). But adolescents may be immature, and less culpable, even if they display basic cognitive abilities like the ability to plan and to understand the concept of punishment. That Simmons displayed that minimum competence does not show that he was able to envision and weigh the consequences of his actions in the way an adult would. Moreover, as this Court has recognized, developmental deficits mitigate culpability even where they do not prevent a person from acting "deliberately." *Tennard* v. *Dretke*, 124 S. Ct. 2562, 2572 (2004).

case by case, whether individual juvenile offenders are sufficiently mature to deserve death—is unworkable. Individualized sentencing cannot be expected to sort mature from immature juvenile offenders, because the very qualities that make 16- and 17-year-olds, as a class, less culpable also make individualized sentencing of juvenile offenders inherently unreliable. A bright line must exclude them—both for the reasons that have led states to set the age of majority at 18 in so many other contexts (*see infra* pp. 35-36), and for reasons quite specific to the imposition of capital punishment.

Because the death penalty is qualitatively different from any other sentence, it requires a "process that will guarantee, as much as is humanly possible, that the sentence was not imposed out of whim, passion, prejudice, or mistake. Surely, no less can be required when the defendant is a minor." *Eddings*, 455 U.S. at 117-118 (O'Connor, J., concurring); *see also Burger* v. *Kemp*, 483 U.S. 776, 823 (1987) (Powell, J., dissenting) ("Imposing the death penalty on an individual who is not yet legally an adult is unusual and raises special concern."). For several reasons, exposing juvenile offenders to the death penalty necessarily creates a constitutionally "unacceptable" "risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." *Lockett* v. *Ohio*, 438 U.S. 586, 605 (1978); *see Atkins*, 536 U.S. at 320-321.

First, the individualized sentencing schemes that the states currently employ simply are not designed to remove immature adolescents from consideration for the death penalty. Although juries may not be precluded from considering youth as a mitigating factor, *see Lockett*, 438 U.S. at 604, a jury would be free to conclude that even the most immature juvenile's developmental deficits were outweighed by the ugliness of his crime or other aggravating circumstances. Consequently, under the current regime there can be no guarantee that even the least mature 16- and 17-year-olds will escape death.

Second, as this Court recognized in *Atkins* with respect to mental retardation, reliance on age as a mitigating factor

"can be a two-edged sword." 536 U.S. at 321. The very fact that mitigates an adolescent defendant's culpability—his youth—can be used to inflame the jury's fears about the defendant's dangerousness and thus increase the likelihood of the death penalty. Indeed, the prosecutor did exactly that in closing argument in this case: "Let's look at the mitigating circumstances. . . . Age, he says. Think about age. Seventeen years old. Isn't that scary? Doesn't that scare you? Mitigating? Quite the contrary I submit. Quite the contrary." TT 1156-1157.[59]

Third, even if sentencing proceedings were structured so that immature juveniles were theoretically excluded from death-eligibility, and juries were instructed that death could be imposed only on exceptionally mature juveniles—which they are not—it would not be possible to achieve the degree of reliability that the Constitution demands. There is simply no way for a jury accurately to identify the particularly precocious adolescents who might possess sufficient culpability to warrant the death penalty. Indeed, this task would prove impossible even for a trained psychologist; no reliable diagnostic measure of this kind exists.[60]

The task of assessing a particular juvenile defendant's maturity is likely to be even more problematic for a jury. A jury evaluating an adolescent defendant may see someone who *looks* like an adult, and thus be more likely to credit the teenager with adult levels of maturity even where there is no reliable basis to do so. "A tall, physically mature juvenile with an adult appearance may very well have the decision-

[59] Simmons' is not the only case in which prosecutors have portrayed youth as aggravating. *See* Ashley Dobbs, *The Use of Youth as an Aggravating Factor in Death Penalty Cases Involving Minors*, 10 Juvenile Justice Update 1, 14-15 (June/July 2004) (collecting examples). Nevertheless, petitioner's contention (Br. 36-37 n.6) that this danger can justify only "a rule regarding how mitigation evidence is presented and argued" is incorrect. Even if prosecutors were forbidden to mention the defendant's youth, there is an inherent risk that the jury will conclude that a younger defendant is more dangerous, for the same reasons that lead prosecutors to invoke the defendant's youth to argue for death.

[60] *See, e.g.*, Steinberg & Scott, *supra* note 19, at 1016.

making abilities of a child. . . . [I]t is inappropriate to draw inferences about a juvenile's psychological or social maturity from his or her physical appearance."[61] Nevertheless, "adults tend to do just this," rendering their assessments of maturity unreliable.[62] In other ways as well, assessments of maturity are likely to be skewed and to be contaminated with various improper considerations. For instance, a recent study found that police and probation officers who were subliminally exposed to words associated with African-Americans and then asked to evaluate a hypothetical juvenile offender "were less likely to judge the offender as immature . . . and more likely to perceive him as culpable and deserving of punishment."[63]

What is more, attempts to gauge a juvenile offender's immaturity at the time of the offense are likely to be confounded by the simple lapse of time between the offense and sentencing. The juvenile offenders who are now under sentence of death were sentenced, on average, over two years after they committed their crimes.[64] That lapse is significant. The very qualities that mitigate adolescents' blameworthiness—their immaturity and unformed nature—are

[61] Steinberg & Schwartz, *supra* note 55, at 24-25.

[62] *Id.* at 25.

[63] Sandra Graham & Brian S. Lowery, *Priming Unconscious Racial Stereotypes About Adolescent Offenders*, 28 L. & Hum. Behav. (forthcoming 2004); *see also* George S. Bridges & Sara Steen, *Racial Disparities in Official Assessments of Juvenile Offenders: Attributional Stereotypes as Mediating Mechanisms*, 63 Am. Sociological Rev. 554, 561 (1998) (finding that, when variables other than race were controlled, probation officers were more likely to attribute the delinquency of African-American juveniles to bad character, as opposed to external forces, and more likely to judge them as posing a risk of future dangerousness).

[64] Based on data collected by Victor Streib, for the juvenile offenders now under a valid sentence of death, the mean number of days between the offense and sentencing was 752, and the median number of days was 549. *See* Victor L. Streib, *The Juvenile Death Penalty Today: Death Sentences and Executions for Juvenile Crimes, January 1, 1973 - June 30, 2004*, at 24-31 (2004), *available at* www.law.onu.edu/faculty/streib/JuvDeathJune302004NewTables.pdf. These figures exclude three juvenile offenders for whom exact dates were unavailable.

inherently perishable. Because of the rapid pace of change and growth in adolescence, at sentencing a jury is likely to see a defendant who appears physically and emotionally more mature than he was at the time of the crime. In a very real sense, the defendant who stands before the jury at sentencing will be a different and more fully developed person than the younger adolescent who committed the crime. Moreover, an adolescent who has been in custody for a significant period between arrest and trial is likely to have undergone profound changes precisely because of his incarceration. For these reasons, it is all but inevitable that the impression made on the jury by the defendant's appearance and demeanor at the time of sentencing will thwart attempts to discern the adolescent offender's immaturity—and level of culpability—at the time of the crime. *Cf. Drope* v. *Missouri*, 420 U.S. 162, 183 (1975) (noting the "inherent difficulties of such a *nunc pro tunc* determination" in the context of a competency hearing).

Fourth, the very factors that make adolescents less culpable also put them at a disadvantage in coping with the adjudicative process, and thus increase the risk of both wrongful convictions and unconstitutionally disproportionate sentences. As with the mentally retarded, adolescents are at greater risk for confessing falsely, will be less able than adults to provide meaningful assistance to counsel, and may be less able to make an effective case for mitigation. *See Atkins*, 536 U.S. at 320-321.

As this Court has recognized, juveniles are more vulnerable than adults to coerced or false confessions. *See, e.g., In re Gault*, 387 U.S. 1, 55 (1967); *Haley* v. *Ohio*, 332 U.S. 596, 599-600 (1948). A recent study analyzing a large group of proven false confessions has concluded that juveniles, including 16- and 17-year-olds, are over-represented among those who confess falsely.[65] Laboratory studies have also

[65] *See* Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. Rev. 891, 941-943 (2004). Drizin and Leo selected a group of 125 "confessions that are indisputably false because . . . dispositive evidence objectively establishes, beyond any doubt, that the confessor could not possibly have been the perpetrator." *Id.* at 923. The vast majority of the false confessions (81%) were to murder. *Id.* at 945 tbl. 5. The authors found that 33% of the false confessions came from juveniles, and approximately half (16%) of those were from 16- and 17-year-olds. *See id.* at 943 tbl. 3.

found that adolescents are more likely than adults to confess falsely to an act they did not commit.[66]

Adolescents' immaturity also means that, even where they meet minimum standards of competence to stand trial, they are less likely to render meaningful assistance to counsel at either the guilt or the penalty phase. Adolescents' well-documented deficits in decision-making, *see supra* Part I.A, will certainly carry over into the adjudicative decision-making process, impairing adolescents' ability to make mature choices about how to interact with their lawyers and how to conduct themselves at trial.

In addition, just as with the mentally retarded, adolescents' "demeanor may create an unwarranted impression of lack of remorse for their crimes." *Atkins*, 536 U.S. at 321. Adolescents' limited temporal perspective may deprive them of an ability to understand the finality of their actions; in other cases, they may adopt a mask of "apparent indifference" as "self-protection against the slings and arrows of their own turbulent feelings."[67] An adult observer may misinterpret these signs and rely on an adolescent defendant's "remorselessness" to justify a death sentence.[68]

Finally, as discussed above, *see supra* Part I.B, assessment of the offender's character in a broad sense is particu-

[66] *See* Allison D. Redlich & Gail S. Goodman, *Taking Responsibility for an Act Not Committed: The Influence of Age and Suggestibility*, 27 L. & Hum. Behav. 141, 148 (2003) (finding that 15- and 16-year-olds were significantly more likely than young adults, when accused, to confess falsely to an act they did not commit).

[67] Martha Grace Duncan, "*So Young and So Untender*": *Remorseless Children and the Expectations of the Law*, 102 Colum. L. Rev. 1469, 1490, 1500 (2002) (internal quotation marks and citation omitted).

[68] *See Thomas* v. *Commonwealth*, 419 S.E.2d 606, 620 (Va. 1992) (sustaining death sentence for 17-year-old based in part on apparent lack of remorse); Duncan, *supra* note 67, at 1486-1491 (discussing *Thomas*).

larly problematic in juveniles. The constitutional requirement of individualized sentencing is designed to enable the jury to reach "a reasoned moral response to the defendant's background, character, and crime." *Brown*, 479 U.S. at 545 (O'Connor, J., concurring). But the changeability that is intrinsic to adolescence precludes a reliable assessment of an individual adolescent's character. Because the adolescent self is not yet fully formed, there is no way an observer can reliably conclude that even a very serious crime committed by an adolescent is the expression of a fixed and irredeemably bad character; there is no way to distinguish the hypothetical juvenile offender who is a hardened criminal from the offender whose crime is a product of the transient influences of adolescence itself.[69] Accordingly, no outside observer can ever reliably determine that any particular juvenile offender falls within the "narrow category" of offenders whose character and consciousness are significantly more "depraved" than the typical adult murderer. *Atkins*, 536 U.S. at 319.

In short, the individualized sentencing scheme designed for adults cannot adequately fulfill its constitutional purpose when the defendant is an adolescent. Like the mentally retarded, adolescents as a class "face a special risk of wrongful execution," *Atkins*, 536 U.S. at 321, and individualized consideration cannot remedy that gross risk of constitutional error. Permitting juries to decide on a case-by-case basis whether juvenile offenders should be put to death thus merely ensures that death will be meted out "wantonly and freakishly," *Furman*, 408 U.S. at 310 (Stewart, J., concurring), contrary to the principle that eligibility for the death penalty be rationally narrowed precisely in order to avoid such a risk. *See, e.g., Arave* v. *Creech*, 507 U.S. 463, 474 (1993).

[69] *See, e.g.*, Steinberg & Scott, *supra* note 19, at 1016. That same difficulty confounds attempts to assess an individual adolescent's future dangerousness, a factor that is often highly important to a jury's determination whether to impose the death penalty. For instance, in Texas—where, since 1973, more executions of juvenile offenders have taken place than in all other states combined, *see* Streib, *supra* note 64, at 4 tbl. 1—the jury is required to find future dangerousness before imposing a death sentence, *see* Tex. Penal Code Ann. § 37.071(2)(b)(1), (c). The key determination whether a defendant is likely to continue a career of criminal violence cannot be reliably made for adolescents.

For all the above reasons, the Eighth Amendment requires that the line "below which a juvenile's crimes can never be constitutionally punished by death," *Thompson*, 487 U.S. at 848 (O'Connor, J., concurring in the judgment), be drawn at 18. That is anything but an arbitrary line: rather, it is the only rational line that can be drawn in this case. As discussed above, given the compelling evidence that 16- and 17-year-old adolescents are still developing, physically, socially, and emotionally, only drawing the line at 18 can protect against the grave risk that immature juvenile offenders, whose character is still unformed and whose culpability cannot rise to the level necessary for imposition of the death penalty, will be executed.

Moreover, a bright line excluding 16- and 17-year-olds from eligibility from the death penalty is consistent with our society's uniform and enduring judgment—expressed in the actions of its legislatures—that adolescents of that age do not possess the same level of personal responsibility as do adults. Eighteen is almost universally the legal boundary between childhood and adulthood,[70] and there is a broad array of legislative prohibitions and protections aimed at those under 18. Our society regards 16- and 17-year-olds as too immature and inexperienced to have a full understanding of the consequences of their decisions, and it does not allow them to vote.[71] It recognizes that they lack a fully developed capacity for moral judgment, and it bars them from sitting in judgment of others.[72] It understands that they are less able

[70] *See* Appendix A (46 jurisdictions set the age of majority at 18; none sets it below 18).

[71] *See* Appendix B (no jurisdiction has lowered the age for voting below 18).

[72] *See* Appendix C (all jurisdictions require a person to be at least 18 to serve on a jury).

than adults to weigh risk and reward, and it forbids them to gamble.[73] It acknowledges that their selves are still changeable, and it presumes that they lack the capacity to make a lifetime commitment to another person.[74] And, knowing that they are still vulnerable and in need of protection, it requires their parents to protect them.[75] These and other special protections and disabilities embody our society's determination that, before the age of 18, adolescents are not fully formed people, and cannot be held fully responsible for choices made by their incomplete selves.

This Court has consistently recognized the relevance of that determination to the Eighth Amendment question presented here. *See, e.g., Thompson*, 487 U.S. at 825 n.23 (plurality); *id.* at 855 (O'Connor, J., concurring in the judgment); *Stanford*, 492 U.S. at 382 (O'Connor, J., concurring in part and in the judgment); *id.* at 394-395 (Brennan, J., dissenting). And that determination remains relevant even if, as the *Stanford* plurality put it, it is not a judgment that no 16- or 17-year-old can ever be sufficiently responsible to make these choices, "but at most a judgment that the vast majority are not." 492 U.S. at 374. The societal recognition that "the vast majority" of 16- and 17-year-olds are insufficiently mature, and their selves insufficiently developed, to make potentially life-altering choices makes clear the magnitude and gravity of the constitutional risk created by exposing those under 18 to the death penalty—a risk that, as demonstrated above, individualized sentencing cannot sufficiently lessen.[76]

[73] *See* Appendix D (all jurisdictions that permit gambling restrict participation by those under 18).

[74] *See* Appendix E (all but four jurisdictions require a person to be 18 to marry without parental or judicial consent).

[75] *See, e.g.*, Ga. Code Ann. § 19-7-2; Md. Code Ann., Fam. Law § 5-203; Miss. Code Ann. § 97-5-3; S.D. Codified Laws § 25-5-18.1; Tenn. Code Ann. § 34-1-102. Although states have not codified the parental caretaking obligation in a uniform way, no state denies parents' basic duty to care for their minor children.

II. THE EXECUTION OF JUVENILE OFFENDERS VIOLATES STANDARDS OF DECENCY, AS REFLECTED IN A NATIONAL, AND INDEED WORLDWIDE, CONSENSUS AGAINST SUCH EXECUTIONS.

In determining whether a punishment is unconstitutionally cruel and unusual, this Court has also asked whether objective indicia demonstrate a societal consensus against its imposition. *See, e.g., Atkins*, 536 U.S. at 313-316. Fifteen years ago, in *Stanford*, the Court concluded that there was not yet sufficient evidence of such a societal consensus against the execution of juvenile offenders. *See* 492 U.S. at 373. Justice O'Connor, however, recognized that "[t]he day may come when there is such general legislative rejection" of the death penalty for juvenile offenders "that a clear national consensus can be said to have developed." *Id.* at 381-382 (O'Connor, J., concurring in part and in the judgment). That day has come.

Since *Stanford*, no state has lowered the minimum age for the death penalty, and a substantial number have amended their laws to include express prohibitions on the execution of juvenile offenders. A significant majority of jurisdictions—31, as in *Atkins*—now expressly bar that punishment. Moreover, even in those states that theoretically permit the execution of juvenile offenders, the punishment is rarely imposed. Only three states have conducted such executions in the last 10 years. Over the last several years, death sentences for juveniles—always very rare—have seen a rapid and statistically significant decline. Excluding resentencings, only one juvenile offender was sentenced to death in 2003. And this national consensus is consistent with a

[76] Petitioner suggests (Br. 34) that if this Court sets the line at 18, it will next be asked to extend the line to 21 or 35. That concern is unwarranted. No state has set the minimum age for executions above 18, precisely because 18 is generally regarded as the age at which a person is sufficiently mature to achieve the status and privileges of adulthood.

worldwide revulsion against the execution of juvenile offenders—a practice that has been almost universally abandoned.

A. Since *Stanford*, A Clear National Consensus Has Emerged Against The Execution Of Juvenile Offenders.

1. A significant majority of jurisdictions expressly prohibit execution of juvenile offenders.

The emergent national consensus against the execution of juvenile offenders is reflected most obviously in state and federal law, the "clearest and most reliable objective evidence of contemporary values." *Atkins*, 536 U.S. at 312 (quoting *Penry*, 492 U.S. at 331). Under the circumstances presented in *Atkins*, this Court concluded that the laws of 31 jurisdictions barring the death penalty for the mentally retarded reflected a national consensus against punishing those persons with death. Since *Stanford*, our nation has moved to repudiate the execution of juvenile offenders just as broadly: 31 jurisdictions and the federal government now expressly prohibit the death penalty for those under 18.

When *Stanford* was decided, 11 states set the minimum age for the death penalty at 18.[77] Since *Stanford*, seven additional states and the federal government have done so. Specifically, in 1993, the Supreme Court of Washington construed its death-penalty statute not to permit the execution

[77] Those states are California, Colorado, Connecticut, Illinois, Maryland, Nebraska, New Jersey, New Mexico, Ohio, Oregon, and Tennessee. *See* Cal. Penal Code § 190.5; Colo. Rev. Stat. § 18-1.4-102(1)(a); Conn. Gen. Stat. § 53a-46a(h); 720 Ill. Comp. Stat. 5/9-1(b); Md. Code Ann., Crim. Law § 2-202(b)(2)(i); Neb. Rev. Stat. § 28-105.01(1); N.J. Stat. Ann. § 2C:11-3(g); N.M. Stat. Ann. § 31-18-14(A); Ohio Rev. Code Ann. § 2929.02(A); Or. Rev. Stat. §§ 161.620, 137.707(2); Tenn. Code Ann. § 37-1-134(a)(1). All of these states have retained their bar on the juvenile death penalty. Although *Stanford* also identified New Hampshire as a state that set the minimum age at 18, *see Stanford*, 492 U.S. at 370 n.2, New Hampshire in fact sets the minimum age for the death penalty at 17, *see* N.H. Rev. Stat. Ann. § 630:1(V).

of those under 18 at the time of the offense. *See State* v. *Furman*, 858 P.2d 1092, 1103 (Wash. 1993).[78] When Kansas reinstated the death penalty in 1994, it set the minimum age at 18. *See* Kan. Stat. Ann. § 21-4622.[79] New York likewise set the minimum age at 18 when it reinstated the death penalty in 1995. *See* N.Y. Penal Law § 125.27.[80] Montana estab-

[78] Petitioner contends (Br. 23-24) that Washington cannot provide evidence of a legislative consensus because its position is the result of a judicial ruling. But the Washington Supreme Court held that Washington's statute—which set no express minimum age—"cannot be construed to authorize imposition of the death penalty for crimes committed by juveniles." *Furman*, 858 P.2d at 1103. The Washington Supreme Court is, of course, the authoritative interpreter of Washington's statutes, *see, e.g.*, *City of Chicago* v. *Morales*, 527 U.S. 41, 61 (1999); *Winters* v. *New York*, 333 U.S. 507, 514 (1948), and the Washington legislature has not disturbed its interpretation in the more than ten years since that ruling.

[79] Petitioner would dismiss the relevance of Kansas law on the ground that Kansas "merely carried over a distinction in its existing sentencing law" exempting those under 18 from the maximum prison term provided by statute, and "[t]here was not a legislative vote in favor of any particular age." Br. 22. Petitioner is simply incorrect. Kansas has expressly prohibited the execution of juvenile offenders since 1935. *See* Kan. Gen. Stat. § 21-403 (1935). When it reinstated the death penalty in 1994, Kansas reaffirmed that long-standing prohibition, expressly providing that if "the defendant was less than 18 years of age" when the crime was committed, "no sentence of death shall be imposed." Kan. Stat. Ann. § 21-4622 (1994).

[80] As with Kansas, petitioner argues (Br. 23) that New York merely "carried . . . over" its prohibition against imposing the previous maximum sentence of life imprisonment without parole on those under 18, and never reached a considered judgment against capital punishment for juveniles. Again, petitioner is mistaken. That New York's exclusion of those under 18 from death-eligibility is found in the definition of first-degree murder, rather than in the death-penalty statute itself, is of no moment, and is merely an artifact of the history of the death penalty in New York. New York has barred the juvenile death penalty since 1963, when it amended its death-penalty statute to include an express exemption for those under 18. *See* Act of May 3, 1963, ch. 994, sec. 1, § 1045(3). After *Furman* invalidated its death-penalty statute, New York created a new crime of first-degree murder, with a mandatory punishment of death. *See* Act of May 17, 1974, ch. 367, sec. 2, § 60.06. The minimum death-eligible age remained 18, but this requirement was incorporated into the elements of the crime of first-degree murder, *see id.* sec. 5, § 125.27(1)(b), and remained an element of first-degree murder even after the new mandatory death pen-

lished a statutory minimum age of 18 in 1999, *see* Mont. Code Ann. § 45-5-102, as did Indiana in 2002, *see* Ind. Code Ann. § 35-50-2-3. Most recently, in March of this year both Wyoming and South Dakota raised the minimum age for the death penalty to 18. *See* Wyo. Stat. Ann. § 6-2-101(b); S.D. Codified Laws § 23A-27A-42.[81] These 18 states, together with the 13 jurisdictions that do not permit the death penalty at all,[82] bring the total number of jurisdictions forbid-

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alty statute was held unconstitutional. When the death penalty was reinstated in 1995, it was therefore unnecessary to specify in the death-penalty statute itself that juveniles were exempt. The legislature was fully aware, however, that juveniles would not be death-eligible. *See* Record of Proceedings, N.Y. State Assembly, Bill No. 4843, at 126, 210, 529 (Mar. 6, 1995) (statements by assemblymen recognizing that the new death-penalty statute barred execution of those under 18 at the time of the crime).

[81] Other state legislatures took significant steps toward enacting bars on the juvenile death penalty in 2004. *See Atkins*, 536 U.S. at 315 (noting bills that passed one or more houses of state legislature as evidence of consensus against execution of mentally retarded). A bill to raise the minimum age for the death penalty to 18 passed both houses of the state legislature in New Hampshire, only to be vetoed by the governor. *See* S. 513 (N.H. 2004). Such a bill was also introduced in Florida and was approved by the Senate. *See* S. 224 (Fla. 2004). The House version of the Florida bill, H.R. 63, was reported out of committee favorably, but the legislative session expired before the bill could be voted on by the House.

[82] The jurisdictions without valid statutes authorizing the death penalty are Alaska, Hawaii, Iowa, Maine, Massachusetts, Michigan, Minnesota, North Dakota, Rhode Island, Vermont, West Virginia, Wisconsin, and the District of Columbia. Although *Stanford* did not consider the states that barred the death penalty altogether as bearing on the question of a national consensus against the juvenile death penalty, *see Stanford*, 492 U.S. at 370 n.2, we believe it is appropriate to do so. *Stanford*'s analogy to "discerning a national consensus that wagering on cockfights is inhumane by counting within that consensus states that bar all wagering," *id.*, is, we respectfully submit, inapt. A state may decide to ban gambling for any number of reasons that have nothing to do with the morality or propriety of the activity being gambled on. By contrast, a state legislature's decision to bar the death penalty altogether necessarily entails a determination that the death penalty is an inappropriate punishment for all offenders, including juveniles.

ding capital punishment of juvenile offenders up to 31.[83] Finally, when Congress enacted the Federal Death Penalty Act in 1994, it expressly barred the imposition of the death penalty on juvenile offenders. *See* 18 U.S.C. § 3591.[84]

In *Atkins*, the Court found notable not only the number of states that had enacted prohibitions on execution of the mentally retarded, but also "the consistency of the direction of change." 536 U.S. at 315. As in *Atkins*, the legislative movement on the issue of the juvenile death penalty has been consistently in one direction—toward higher minimum ages for the death penalty. Although *Stanford* made clear that the jurisdictions that prohibited the juvenile death penalty in 1989 were free to reinstate it, none has done so in the 15 years since that decision.[85]

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[83] Of the remaining states, four set the statutory minimum age for the death penalty at 17. *See* Ga. Code Ann. § 17-9-3; N.H. Rev. Stat. Ann. § 630:1(V); N.C. Gen. Stat. § 14-17 (minimum age is generally 17, but those under 17 who commit murder while serving a prison sentence for a previous murder may receive the death penalty); Tex. Penal Code Ann. § 8.07(c). Four set the minimum age at 16. *See* Ky. Rev. Stat. Ann. § 640.040(1); Mo. Rev. Stat. § 565.020; Nev. Rev. Stat. 176.025; Va. Code Ann. § 18.2-10(a). The remaining twelve states set no express statutory minimum age for the death penalty. *See* Ala. Code § 13A-6-2(c); Ariz. Rev. Stat. § 13-703(A); Ark. Code Ann. § 5-4-615; Del. Code Ann. tit. 11, § 4209(a); Fla. Stat. ch. 985.225(1); Idaho Code § 18-4004; La. Rev. Stat. Ann. § 14:30(c); Miss. Code Ann. § 97-3-21; Okla. Stat. tit. 21, § 701.10; 18 Pa. Cons. Stat. Ann. § 1102; S.C. Code Ann. § 16-3-20; Utah Code Ann. § 76-3-206(1).

[84] Contrary to petitioner, therefore, Congress has clearly spoken against the juvenile death penalty. While petitioner contends (Br. 27-28) that the Senate's decision not to ratify treaties barring the juvenile death penalty, or to ratify them with a reservation of the right to impose death on juveniles, demonstrates that Congress has endorsed the juvenile death penalty, those decisions merely left states free to set their own criminal punishments, as is appropriate—subject to constitutional constraints—in our federal system. When Congress itself addressed the question, it chose to forbid imposition of the death penalty on juveniles.

[85] Petitioner's suggestion that some states have "moved the other way" (Br. 24) is incorrect. Although petitioner contends (Br. 25-26) that Arizona and Florida effectively lowered the age for the death penalty, in neither case did the legislature make any determination regarding the appropriate minimum age for capital punishment. In Arizona, the law was

The consistent legislative movement away from the death penalty for 16- and 17-year-old offenders is especially striking in a time when "anticrime legislation is far more popular than legislation providing protections for persons guilty of violent crime." *Atkins*, 536 U.S. at 315. Indeed, the legislative consensus against the death penalty for juvenile offenders is still more compelling than the consensus found in *Atkins*, because it has endured and grown in a time when legislation imposing more stringent penalties for *juvenile*

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amended to provide that juveniles 15 and older accused of certain serious violent crimes were subject to mandatory prosecution as adults. *See* Ariz. Rev. Stat. § 13-501(A). The amendment did not mention the death penalty. As this Court has recognized, such statutes, which merely provide for trial of juveniles in adult court, in no way constitute a legislative judgment that the death penalty is appropriate for juveniles. *See Thompson*, 487 U.S. at 826 n.24 (plurality); *id.* at 850 (O'Connor, J., concurring in the judgment). Indeed, the Arizona Supreme Court held that the death penalty could not constitutionally be imposed on a juvenile tried in adult court pursuant to that provision. *See State* v. *Davolt*, 84 P.3d 456, 481 (Ariz. 2004).

In Florida, the state constitution's prohibition on "cruel *or* unusual punishment" was amended to conform to the federal Constitution's prohibition of "cruel *and* unusual" punishment. Fla. Const. art. I, § 17 (2002) (emphasis added). Again, the amendment did not speak at all to the appropriate age for the death penalty. Petitioner appears to contend that the amendment was intended to overturn the Florida Supreme Court's decision barring execution of 16-year-old offenders. *See Brennan* v. *State*, 754 So. 2d 1 (Fla. 1999). (Although petitioner refers (Br. 26) to *Allen* v. *State*, 636 So. 2d 494 (Fla. 1994), which barred execution of 15-year-old offenders, that appears to be an error.) But *Brennan* did not turn solely on the "cruel or unusual" language of the Florida Constitution; rather, it made clear that the imposition of death on a 16-year-old "would be unconstitutional under both the Florida and United States Constitutions," because the Florida statute did not provide individualized consideration of the juvenile defendant's maturity and moral responsibility. 754 So. 2d at 8. The legislative history of the Florida amendment confirms that it was not intended to overturn *Brennan*. *See* H.R. Comm. on Crime Prevention, Corrections & Safety, Final Analysis, House Bill 951, at 9 (June 26, 2001) (concluding that the amendment would not affect *Brennan*).

Finally, although both Missouri and Virginia amended their death-penalty statutes after *Stanford* to set a minimum age of 16 (*see* Pet. Br. 24-25), those amendments merely confirmed prior practice, and represented no shift in policy in those states.

crime has been particularly popular. The rising rate of juvenile crime during the 1980s and early 1990s profoundly changed public perception of the juvenile justice system and of juvenile offenders, who were widely believed to be "qualitatively different" and more vicious than such offenders had been in the past.[86] The menacing figure of the juvenile "superpredator" was often invoked in support of calls to treat juvenile offenders like adults.[87] Although the "superpredator" was eventually exposed as a myth, during the 1990s that "myth caused a panic that changed the juvenile justice system and its response to the Nation's youth."[88] Since *Stanford*, virtually every state has taken action to ensure more stringent treatment of juveniles; between 1992 and 1997, 45 states modified their laws governing transfer of juveniles to provide that more offenders under the age of 18 would be tried as adults.[89] In the midst of this "sea of change sweeping across the Nation,"[90] and reflecting a significantly more punitive stance toward juvenile offenders, the steady legislative movement away from the death penalty for such offenders demonstrates a national consensus that transcends passing fashions in juvenile justice.

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[86] Franklin E. Zimring, *American Youth Violence* 6 (1998).

[87] *See, e.g., id.* at 6-7; David S. Tanenhaus & Steven A. Drizin, *"Owing to the Extreme Youth of the Accused": The Changing Legal Response to Juvenile Homicide*, 92 J. Crim. L. & Criminology 641, 642-643, 664-665 (2002). As one account put it: "America is now home to thickening ranks of juvenile 'super-predators'—radically impulsive, brutally remorseless youngsters . . . who murder, assault, rape, rob, burglarize, deal deadly drugs, join gun-toting gangs, and create serious communal disorders." William J. Bennett et al., *Body Count: Moral Poverty . . . And How to Win America's War Against Crime and Drugs* 27 (1996).

[88] *See, e.g.*, Snyder & Sickmund, *supra* note 52, at 133; *see also Youth Violence: A Report of the Surgeon General* 5 (2001) (concluding that the "superpredator" was a "myth," and that there was no evidence that juvenile offenders of the 1990s were more vicious than in the past).

[89] *See* Snyder & Sickmund, *supra* note 52, at 89.

[90] Patricia Torbet et al., National Center for Juvenile Justice, *State Responses to Serious and Violent Juvenile Crime: Research Report* xi (1996).

2. The death penalty is rarely inflicted on juvenile offenders.

This broad national consensus is reflected not only in the judgments of our legislatures, but also in the infrequency with which the punishment of death is actually inflicted on a juvenile offender. *See, e.g.*, *Atkins*, 536 U.S. at 316; *Thompson*, 487 U.S. at 852 (O'Connor, J., concurring in the judgment); *Coker* v. *Georgia*, 433 U.S. 584, 596-597 (1977). By any measure, both executions and death sentences imposed on juvenile offenders are exceedingly rare.

In the last 10 years, only three of the 20 states that theoretically permit the execution of juvenile offenders have actually carried out such executions: Texas, Oklahoma, and Virginia.[91] *Cf. Atkins*, 536 U.S. at 316 (noting that, in the past 13 years, only five states had executed offenders known to be mentally retarded). Indeed, since 1973, the beginning of the death penalty's modern era, only 22 persons have been executed for crimes committed as juveniles, in only seven states.[92] Texas alone accounts for nearly two-thirds of all such executions.[93]

Death sentences for juveniles are also concentrated in a small handful of states. In the last 10 years, only three states—Texas, Florida, and Alabama—account for nearly 60% of all juvenile death sentences.[94] Only 13 states (including Missouri) currently have any juvenile offenders under sentence of death.[95] Four states that theoretically permit the juvenile death penalty—Delaware, Idaho, New Hampshire, and Utah—have neither executed a juvenile offender

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[91] *See* Streib, *supra* note 64, at 4 tbl. 1.

[92] *See id.* By comparison, data collected by the American Bar Association, and cited by the Missouri Supreme Court, show that 24 mentally retarded offenders were executed between 1976 and 2002, when *Atkins* was decided. JA 135.

[93] *See* Streib, *supra* note 64, at 3.

[94] *See id.* at 20-32 (listing juvenile death sentences from 1994 to present).

[95] *See id.* at 11.

nor sentenced one to death in the 15 years since *Stanford*.[96] The extreme rarity with which the juvenile death penalty is imposed even in most states that theoretically allow it demonstrates that legislative authorization does not signify general acceptance in those states. As *Atkins* observed, 536 U.S. at 316, "there is little need to pursue legislation barring" a punishment that is never, or rarely, practiced.

The available evidence also indicates that juries are increasingly reluctant to put juvenile offenders to death. Since 1999, when there were 14 death sentences for juvenile offenders,[97] the number of death sentences for juveniles has declined each year. As a recent study analyzing sentencing patterns notes, after resentencings are excluded, in 2000, there were seven new juvenile death sentences; in 2001, five; in 2002, three; and in 2003, just one juvenile offender was sentenced to death.[98] That study found that, although death sentences in general have declined since 1999, the magnitude and precipitousness of the decline for juvenile offenders are significantly greater than for adults.[99] Moreover, the rate at which juvenile offenders are sentenced to death (expressed as the number of juvenile death sentences per 100 homicide arrests of offenders under 18) also declined sharply in that period, from 1.61% to 0.20%.[100] The study concluded that the decline in juvenile death sentences is statistically significant

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[96] *See id.* at 4 tbl. 1, 10 tbl. 4.

[97] *See id.* at 9 tbl. 3.

[98] *See* Jeffrey Fagan & Valerie West, *The Decline of the Juvenile Death Penalty: Scientific Evidence of Evolving Norms*, J. Crim. L. & Criminology (forthcoming Winter 2004) (analyzing sentencing patterns from 1990 to 2003). The study excluded resentencings of juvenile offenders who had previously been sentenced to death because such sentences are not independent of the initial sentence and would distort the statistical analysis. *See id.* Even if resentencings are included, however, the decline in juvenile death sentences has been stark—from 14 in 1999 to seven in 2000, seven in 2001, four in 2002, and two in 2003. *See* Streib, *supra* note 64, at 9 tbl. 3. Thus far in 2004, only one juvenile offender has been sentenced to death. *See id.*

[99] *See* Fagan & West, *supra* note 98.

[100] *See id.*

after controlling for alternative explanations such as declines in the murder rate, in the number of juveniles arrested for homicide, and in death sentences in general.[101] Thus, in the last several years, not only the actions of legislatures, but also the sentences imposed by juries show a demonstrable and significant trend toward rejection of the death penalty for juveniles.[102]

In short, the death penalty for juvenile offenders has become exceedingly rare—so rare as to be "cruel and unusual in the same way that being struck by lightning is cruel and unusual." *Furman*, 408 U.S. at 309 (Stewart, J., concur-

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[101] *See id.*

[102] Petitioner contends (Br. 29-32) that juveniles are more likely to receive the death penalty now than at the time of *Stanford*. But petitioner's data do not support that conclusion. First, petitioner examines juvenile death sentences as a percentage of total death sentences, and executions of juvenile offenders as a percentage of total executions. (It should be noted that petitioner misstates (Br. 30) the total number of death sentences from 1990 to 2003; that total is 3599, not 359. *See* Streib, *supra* note 64, at 9 tbl. 3.) Those percentages show that death sentences and executions of juvenile offenders are very rare in absolute numbers, and thus "support the inference of a national consensus opposing the death penalty" for juveniles. *Thompson*, 487 U.S. at 853 (O'Connor, J., concurring in the judgment). But they cannot show the rate at which juveniles are sentenced to death or changes in that rate over time, since they fail to control for the different rate at which adults and juveniles commit crimes and for variation in the age distribution of offenses over time. *See, e.g., id.* Accordingly, no conclusions at all can be drawn from petitioner's data.

Second, the time periods petitioner chooses to examine are too broad and arbitrary to shed any significant light on the question of trends in sentencing over time. Petitioner contends that executions of juvenile offenders made up a greater proportion of total executions during the period from 1973 to 2003 than during the period from 1642 to 1986, and that juvenile death sentences were a greater proportion of total death sentences during the period from 1990 to 2003 than during the period from 1982 to 1988. Comparing a span of nearly 350 years to a span of 30 years is far too crude to show trends relevant to today's standards of decency; similarly, looking at the period from 1990 to 2003 as an undifferentiated whole obscures the statistically significant downward trend in juvenile death sentences that has occurred within that period.

ring). That is a clear indication that contemporary morality rejects the punishment of death for juvenile offenders.[103]

B. The National Consensus Is Consistent With A Worldwide Revulsion Against The Execution Of Juvenile Offenders.

In the 15 years since *Stanford*, it has become clear that an overwhelming worldwide consensus rejects the execution of juvenile offenders. Almost without exception, the other nations of the world have rejected capital punishment of those under 18, confirming that the juvenile death penalty is

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[103] In an attempt to counter the evidence that the American polity—through the actions of its legislatures, prosecutors, and juries—has rejected capital punishment for juvenile offenders, petitioner offers the results of a miscellaneous assortment of surveys and opinion polls (Br. 38-40), contending that they "demonstrate[] societal acceptance of capital punishment for juveniles" (Br. 40). As petitioner concedes (Br. 38), polls—even when conducted by reputable polling organizations according to accepted methods—are "an uncertain foundation upon which to rest constitutional law." Certainly, they cannot outweigh the "reliable objective evidence of contemporary values" provided by the determinations of legislatures and juries. *Atkins*, 536 U.S. at 312.

In any event, even if scientifically sound opinion polls could carry some weight in the analysis, petitioner's data suffer from such obvious methodological defects and disabling biases that they cannot possibly be taken as reliable evidence that our society accepts the juvenile death penalty. Petitioner primarily relies on polls asking respondents, in the wake of particularly notorious, high-profile crimes, if they support imposition of the death penalty on the juveniles who committed those crimes. Br. 39-40. Such polls obviously tend to elicit exaggeratedly punitive, and unreliable, responses. Petitioner also relies on a survey of juvenile court judges and a mock jury study. Br. 40. The survey of judges, taken 10 years ago, actually shows that a distinct minority of that decidedly unrepresentative group—"89 percent white, 83 percent male, and 91 percent older than 40"—then supported the juvenile death penalty. Rorie Sherman, *Juvenile Judges Say: Time to Get Tough*, Nat'l L.J., Aug. 8, 1994, at A1. The mock jury study elicited such astonishingly punitive responses—60% of respondents voted to execute a 10-year-old defendant—that the authors of the study themselves called the results "startling." Catherine A. Crosby et al., *The Juvenile Death Penalty and the Eighth Amendment*, 19 L. & Hum. Behav. 245, 257 (1995). The authors also questioned whether their sample was "skewed," and "caution[ed] against the use of the present data as grounds for any legislative or constitutional changes." *Id.* at 256, 260.

contrary to Eighth Amendment standards of decency. *See, e.g., Atkins*, 536 U.S. at 316 n.21 (recognizing relevance of international law and practice); *Thompson*, 487 U.S. at 830 n.31 (plurality); *Enmund*, 458 U.S. at 796 n.22; *cf. Lawrence* v. *Texas*, 539 U.S. 558, 123 S. Ct. 2472, 2483 (2003) (in interpreting the Due Process Clause, noting that "[t]he right the petitioners seek . . . has been accepted as an integral part of human freedom in many other countries").

Perhaps most significantly, in 1989 the United Nations adopted the Convention on the Rights of the Child ("CRC"), which bars capital punishment for those under 18. *See* United Nations Convention on the Rights of the Child, Nov. 20, 1989, art. 37, 1577 U.N.T.S. 3, 28 I.L.M. 1448, 1468-1470 (entered into force Sept. 2, 1990). Every country in the world, except the United States and Somalia—which has no organized government—has now ratified the CRC; none has entered a reservation to the article prohibiting the execution of juvenile offenders.[104]

[104] *See* Office of the U.N. High Comm'r for Human Rights, Status of Ratifications of the Principal Human Rights Treaties (June 9, 2004), *available at* www.unhchr.ch/pdf/report.pdf ("Status of Ratifications"); Office of the U.N. High Comm'r for Human Rights, Declarations and Reservations to the Convention on the Rights of the Child, *available at* www.ohchr.org/english/law/crc-reserve.htm (last visited July 19, 2004). At least three other international human-rights treaties also bar the execution of juvenile offenders. *See* International Covenant on Civil and Political Rights ("CCPR"), Dec. 16, 1966, art. 6(5), 999 U.N.T.S. 171 (entered into force Mar. 23, 1976); American Convention on Human Rights ("ACHR"), Nov. 22, 1969, art. 4(5), 1144 U.N.T.S. 143, 146 (entered into force July 19, 1978); African Charter on the Rights and Welfare of the Child ("ACRWC"), art. 5(3), OAU Doc. CAB/LEG/24.9/49 (1990) (entered into force Nov. 29, 1999). Since *Stanford*, 69 countries have become parties to the CCPR; as of June 9, 2004, 152 countries are parties to that treaty. *See* Status of Ratifications. Twenty-five countries are parties to the ACHR, *see* Organization of American States, American Convention on Human Rights, *available at* www.oas.org/juridico/english/Sigs/b-32.html (last visited July 19, 2004), and 33 countries are parties to the ACRWC, *see* African Union, List of Countries Which Have Signed, Ratified/Acceded to the African Charter on the Rights and Welfare of the Child, *available at* www.africa-union.org (last visited July 19, 2004).

Consistent with the international norm expressed in the CRC, since 1990 executions of juvenile offenders worldwide have virtually ceased. In that time, only seven countries other than the United States are believed to have executed juvenile offenders: Iran, Pakistan, Saudi Arabia, Yemen, Nigeria, the Democratic Republic of Congo, and China.[105] Only Iran and Pakistan have executed more than one juvenile offender in that time.[106] These sporadic and isolated executions of juvenile offenders are not countenanced even by the countries where they took place; all of them have either enacted prohibitions on the execution of juvenile offenders or publicly disavowed the practice.[107]

The nearly universal consensus against the execution of juvenile offenders that has emerged since *Stanford* led the Inter-American Commission on Human Rights to declare that the prohibition on such executions is now a binding norm of international law. *See Domingues* v. *United States*, Case No. 12.285, Inter-Am. C.H.R. Rep. No. 62/02, ¶ 84 (2002). Fifteen years earlier, in 1987, the Commission had determined that sufficient evidence did not yet exist to warrant a conclusion that capital punishment of persons under

[105] *See* Amnesty International, *Stop Child Executions! Ending the Death Penalty for Child Offenders* (2004) (AI Index: ACT 50/001/2004).

[106] *See id.*

[107] Iran has ratified both the CCPR and the CRC, and has consistently denied executing juvenile offenders. *See* Amnesty International, *The Exclusion of Child Offenders from the Death Penalty Under General International Law* 23-24 (2003) (AI Index: ACT 50/004/2003). Pakistan enacted a prohibition on the execution of juvenile offenders in 2000. *See id.* at 25-26. Saudi Arabia ratified the CRC in 1996, and has not executed a juvenile offender since that time. *See id.* Yemen raised the minimum age for the death penalty to 18 in 1994. *See id.* at 27. Nigeria has ratified the CCPR and the CRC, and has denied executing juvenile offenders. *See id.* at 24-25. The execution of a juvenile offender that reportedly took place in the Democratic Republic of Congo was carried out by a military court; the DRC has denied executing juvenile offenders and has commuted four other death sentences imposed by the military courts on juveniles. *See id.* at 22-23. China abolished the juvenile death penalty in 1997; the lone execution of a juvenile offender reportedly carried out in 2003 was illegal. *See Stop Child Executions*, *supra* note 105.

the age of 18 violated international customary norms. *See Roach and Pinkerton* v. *United States*, Case No. 9647, Inter-Am. C.H.R. Rep. No. 3/87, ¶ 60 (1987). In *Domingues*, the Commission considered the "nearly unanimous and unqualified international trend toward prohibiting" the execution of juvenile offenders over the last 15 years and concluded that a *jus cogens* norm, binding on all states, "has emerged prohibiting the execution of offenders under the age of 18 years at the time of their crime." *Domingues*, ¶¶ 76, 84-85. The small minority of United States jurisdictions that continue to execute those under 18 now stand virtually alone—not just in this country, but in a world that has concluded that the execution of juvenile offenders is contrary to contemporary standards of decency.

CONCLUSION

The judgment of the Missouri Supreme Court should be affirmed.

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APPENDIX A

STATE STATUTES ESTABLISHING AN AGE OF MAJORITY

State	Age	Statute
Alabama	19	Ala. Code § 26-1-1
Alaska	18	Alaska Stat. § 25.20.010
Arizona	18	Ariz. Rev. Stat. § 1-215(3)
Arkansas	18	Ark. Code Ann. § 9-25-101
California	18	Cal. Fam. Code §§ 6500–6502
Colorado	18	Colo. Rev. Stat. § 13-22-101
Connecticut	18	Conn. Gen. Stat. § 1-1d
Delaware	18	Del. Code Ann. tit. 1, § 701
District of Columbia	18	D.C. Code Ann. § 46-101
Florida	18	Fla. Stat. ch. 743.07
Georgia	18	Ga. Code. Ann. § 39-1-1
Hawaii	18	Haw. Rev. Stat. § 577-1
Idaho	18	Idaho Code § 32-101
Illinois	18	755 Ill. Comp. Stat. 5/11-1
Indiana	18	Ind. Code § 1-1-4-5(1)
Iowa	18	Iowa Code § 599.1 (but minors may attain majority by marriage)
Kansas	18	Kan. Stat. Ann. § 38-101 (16 for some purposes if married)
Kentucky	18	Ky. Rev. Stat. Ann. § 2.015
Louisiana	18	La. Civ. Code Ann. art. 29
Maine	18	Me. Rev. Stat. Ann. tit. 1, § 72
Maryland	18	Md. Code Ann. art. 1, § 24
Massachusetts	18	Mass. Gen. Laws ch. 4, § 7, cl. 51
Michigan	18	Mich. Comp. Laws § 722.52
Minnesota	18	Minn. Stat. § 645.451

State	Age	Statute
Mississippi	21	Miss. Code. Ann. § 1-3-27
Missouri	—	No uniform age
Montana	18	Mont. Const. art. II, § 14 Mont. Code Ann. § 41-1-101
Nebraska	19	Neb. Rev. Stat. § 43-2101 (but minors may attain majority by marriage)
Nevada	18	Nev. Rev. Stat. 129.010
New Hampshire	18	N.H. Rev. Stat. Ann. § 21:44
New Jersey	18	N.J. Stat. Ann. § 9:17B-3
New Mexico	18	N.M. Stat. Ann. § 28-6-1
New York	18	N.Y. C.P.L.R. § 105(j) N.Y. Dom. Rel. Law § 2
North Carolina	18	N.C. Gen. Stat. § 48A-2
North Dakota	18	N.D. Cent. Code § 14-10-01
Ohio	18	Ohio Rev. Code Ann. § 3109.01
Oklahoma	18	Okla. Stat. tit. 15, § 13
Oregon	18	Or. Rev. Stat. § 109.510 (but minors may attain majority by marriage, *see id.* § 109.520)
Pennsylvania	21	1 Pa. Cons. Stat. § 1991
Rhode Island	18	R.I. Gen. Laws § 15-12-1
South Carolina	18	S.C. Const. art. XVII, § 14
South Dakota	18	S.D. Codified Laws § 26-1-1
Tennessee	18	Tenn. Code Ann. § 1-3-105(1)
Texas	18	Tex. Civ. Prac. & Rem. Code Ann. § 129.001
Utah	18	Utah Code Ann. § 15-2-1 (but minors may attain majority by marriage)

State	Age	Statute
Vermont	18	Vt. Stat. Ann. tit. 1, § 173
Virginia	18	Va. Code Ann. § 1-13.42
Washington	18	Wash. Rev. Code § 26.28.010
West Virginia	18	W. Va. Code § 2-2-10(aa)
Wisconsin	18	Wis. Stat. Ann. §§ 938.02(1), 990.01(3) (defining "adult" for all purposes except investigation or prosecution of violations of law)
Wyoming	18	Wyo. Stat. Ann. § 14-1-101

APPENDIX B

STATE STATUTES ESTABLISHING A MINIMUM AGE TO VOTE

State	Age	Statute
Alabama	18	Ala. Const. amend. 579
Alaska	18	Alaska Const. art. V, § 1
		Alaska Stat. § 15-05-010
Arizona	18	Ariz. Const. art. VII, § 2
		Ariz. Rev. Stat. § 16-101
Arkansas	18	Ark. Code Ann. § 9-25-101
California	18	Cal. Const. art. 2, § 2
Colorado	18	Colo. Rev. Stat. § 1-2-101
Connecticut	18	Conn. Const. art. 6, § 1
		Conn. Gen. Stat. § 9-12
Delaware	18	Del. Code Ann. tit. 15, § 1701
District of Columbia	18	D.C. Code Ann. § 1-1001.02(2)(B)
Florida	18	Fla. Stat. ch. § 97.041
Georgia	18	Ga. Const. art. 2, § 1, para. 2
		Ga. Code Ann. § 21-2-216
Hawaii	18	Haw. Const. art. II, § 1
		Haw. Rev. Stat. § 11-12
Idaho	18	Idaho Code § 34-402
Illinois	18	Ill. Const. art. III, § 1
		10 Ill. Comp. Stat. 5/3-1
Indiana	18	Ind. Code § 3-7-13-1
Iowa	18	Iowa Code § 48A.5
Kansas	18	Kan. Const. art. 5, § 1
Kentucky	18	Ky. Const. § 145

State	Age	Statute
Louisiana	18	La. Const. art. I, § 10
		La. Rev. Stat. Ann. § 18:101
Maine	18	Me. Const. art. II, § 1
		Me. Rev. Stat. Ann. tit. 21-A, § 111
Maryland	18	Md. Code Ann., Elec. § 3-102
Massachusetts	18	Mass. Gen. Laws ch. 51, § 1
Michigan	18	Mich. Comp. Laws § 168.492
Minnesota	18	Minn. Stat. § 201.014
Mississippi	18	Miss. Const. art. 12, § 241
Missouri	18	Mo. Const. art. VIII, § 2
Montana	18	Mont. Const. art. IV, § 2
		Mont. Code Ann. 13-1-111
Nebraska	18	Neb. Const. art. VI, § 1
		Neb. Rev. Stat. § 32-110
Nevada	18	Nev. Rev. Stat. 293.485
New Hampshire	18	N.H. Const. Pt. 1 Art 11
New Jersey	18	N.J. Const. art. II, § 1, para. 3
New Mexico	18	[no provision other than U.S. Const. amend. XXVI]
New York	18	N.Y. Elec. Law § 5-102
North Carolina	18	N.C. Gen. Stat. § 163-55
North Dakota	18	N.D. Const. art. II, § 1
Ohio	18	Ohio Const. art. V, § 1
		Ohio Rev. Code Ann. § 3503.01
Oklahoma	18	Okla. Const. art. III, § 1
Oregon	18	Or. Const. art. II, § 2
Pennsylvania	18	25 Pa. Cons. Stat. § 2811
Rhode Island	18	R.I. Gen. Laws § 17-1-3

State	Age	Statute
South Carolina	18	S.C. Code Ann. § 7-5-610
South Dakota	18	S.D. Const. art. VII, § 2 S.D. Codified Laws Ann. § 12-3-1
Tennessee	18	Tenn. Code Ann. § 2-2-102
Texas	18	Tex. Elec. Code Ann. § 11.002
Utah	18	Utah Const. art. IV, § 2 Utah Code Ann. §20A-2-101
Vermont	18	Vt. Stat. Ann. tit. 17, § 2121
Virginia	18	Va. Const. art. II, § 1
Washington	18	Wash. Const. art. VI, § 1
West Virginia	18	W. Va. Code § 3-1-3
Wisconsin	18	Wis. Const. art. III, § 1 Wis. Stat. § 6.02
Wyoming	18	Wyo. Stat. Ann. §§ 22-1-102, 22-3-102

APPENDIX C

STATE STATUTES ESTABLISHING A MINIMUM AGE FOR JURY SERVICE

State	Age	Statute
Alabama	19	Ala. Code § 12-16-60(a)(1)
Alaska	18	Alaska Stat. § 09.20.010(a)(3)
Arizona	18	Ariz. Rev. Stat. § 21-301(D)
Arkansas	18	Ark. Code Ann. §§ 16-31-101, 16-32-302
California	18	Cal. Civ. Proc. § 203(a)(2)
Colorado	18	Colo. Rev. Stat. § 13-71-105(2)(a)
Connecticut	18	Conn. Gen. Stat. § 51-217(a)
Delaware	18	Del. Code Ann. tit. 10, § 4509(b)(2)
District of Columbia	18	D.C. Code Ann. § 11-1906(b)(1)(C)
Florida	18	Fla. Stat. § 40.01
Georgia	18	Ga. Code Ann. §§ 15-12-60, 15-12-163
Hawaii	18	Haw. Rev. Stat. § 612-4(a)(1)
Idaho	18	Idaho Code § 2-209(2)(a)
Illinois	18	705 Ill. Comp. Stat. 305/2
Indiana	18	Ind. Code § 33-28-4-8
Iowa	18	Iowa Code § 607A.4(1)(a)
Kansas	18	Kan. Stat. Ann. § 43-156 (jurors must be qualified to be electors); Kan. Const. art. 5, § 1 (person must be 18 to be qualified elector)
Kentucky	18	Ky. Rev. Stat. Ann. § 29A.080(2)(a)
Louisiana	18	La. Code Crim. Proc. Ann. art. 401(a)(2)
Maine	18	Me. Rev. Stat. Ann. tit. 14, § 1211

State	Age	Statute
Maryland	18	Md. Code Ann., Cts. & Jud. Proc. § 8-104
Massachusetts	18	Mass. Gen. Laws. ch. 234, § 1 (jurors must be qualified to vote); *id.* ch. 51, § 1 (person must be 18 to vote)
Michigan	18	Mich. Comp. Laws § 600.1307a(1)(a)
Minnesota	18	Minn. Dist. Ct. R. 808(b)(2)
Mississippi	21	Miss. Code Ann. § 13-5-1
Missouri	21	Mo. Rev. Stat. § 494.425(1)
Montana	18	Mont. Code Ann. § 3-15-301
Nebraska	19	Neb. Rev. Stat. § 25-1601
Nevada	18	Nev. Rev. Stat. 6.010 (juror must be qualified elector); *id.* 293.485 (person must be 18 to vote)
New Hampshire	18	N.H. Rev. Stat. Ann. § 500-A:7-a(I)
New Jersey	18	N.J. Stat. Ann. § 2B:20-1(a)
New Mexico	18	N.M. Stat. Ann. § 38-5-1
New York	18	N.Y. Judiciary Law § 510(2)
North Carolina	18	N.C. Gen. Stat. § 9-3
North Dakota	18	N.D. Cent. Code § 27-09.1-08(2)(b)
Ohio	18	Ohio Rev. Code Ann. § 2313.42
Oklahoma	18	Okla. Stat. tit. 38, § 28
Oregon	18	Or. Rev. Stat. § 10.030(2)(c)
Pennsylvania	18	42 Pa. Cons. Stat. § 4502(a) (jurors must be of minimum age to vote); 25 Pa. Cons. Stat. § 2811 (person must be 18 to vote)
Rhode Island	18	R.I. Gen. Laws § 9-9-1(a)(2)
South Carolina	18	S.C. Code Ann. § 14-7-130

State	Age	Statute
South Dakota	18	S.D. Codified Laws § 16-13-10
Tennessee	18	Tenn. Code Ann. § 22-1-101
Texas	18	Tex. Gov't Code Ann. § 62.102(1)
Utah	18	Utah Code Ann. § 78-46-7(1)(b)
Vermont	18	Vt. Stat. Ann. tit. 4, § 962(a)(1) (jurors must have attained age of majority); *id.* tit. 1, § 173 (age of majority is 18)
Virginia	18	Va. Code Ann. § 8.01-337
Washington	18	Wash. Rev. Code § 2.36.070
West Virginia	18	W. Va. Code § 52-1-8(b)(1)
Wisconsin	18	Wis. Stat. § 756.02
Wyoming	18	Wyo. Stat. Ann. § 1-11-101 (jurors must be adults); *id.* § 14-1-101 (person becomes an adult at 18)

APPENDIX D

STATE STATUTES ESTABLISHING A MINIMUM AGE FOR GAMBLING

State	Age	Statute
Alabama	19	Ala. Code § 11-65-44 (pari-mutuel betting)
Alaska	—	No legalized gambling.
Arizona	21	Ariz. Rev. Stat. § 5-112(L) (pari-mutuel betting)
		Ariz. Rev. Stat. §§ 5-515, 5-515.02 (lottery)
		Ariz. Rev. Stat. § 5-601.02 (gambling on Indian tribal lands)
Arkansas	18	Ark. Code Ann. § 23-110-405 (pari-mutuel betting)
California	18	Cal. Gov't Code § 8880.52 (lottery)
Colorado	18	Colo. Rev. Stat. § 12-60-601 (pari-mutuel betting)
		Colo. Rev. Stat. § 24-35-214(1)(c) (lottery)
	21	Colo. Rev. Stat. § 12-47.1-809 (casinos)
Connecticut	18	Conn. Gen. Stat. § 12-576 (any form of gambling)
		Conn. Gen. Stat. § 12-813 (lottery)
Delaware	18	Del. Const. art. II, § 17 (lottery)
		Del. Code Ann. tit. 29, § 4810 (lottery)
	21	Del. Code Ann. tit. 29, § 4810 (video lottery machine)
District of Columbia	18	D.C. Code Ann. § 3-1334 (any gambling)

State	Age	Statute
Florida	18	Fla. Stat. chs. 24.116(1), 24.1055 (lottery)
		Fla. Stat. ch. 550.0425 (pari-mutuel betting)
		Fla. Stat. ch. 849.04 (keno, pool, or other games of chance)
Georgia	18	Ga. Code Ann. § 50-27-10(9) (lottery)
Hawaii	18	Haw. Rev. Stat. § 712-1231(a)(5) (social gambling)
Idaho	18	Idaho Code § 54-2512(7) (parimutuel betting)
		Idaho Code §§ 67-7413, 67-7415 (lottery)
Illinois	18	20 Ill. Comp. Stat. 1605/15 (lottery)
	21	230 Ill. Comp. Stat. 10/18(b)(1) (riverboat gambling)
Indiana	18	Ind. Code § 4-30-12-1 (lottery)
		Ind. Code § 4-31-7-2 (pari-mutuel betting)
	21	Ind. Code § 4-33-9-12 (riverboat gambling)
Iowa	21	Iowa Code § 99D.11(7) (pari-mutuel betting)
		Iowa Code § 99F.9(5) (gambling boats)
		Iowa Code § 99G.30(3) (lottery)
Kansas	18	Kan. Stat. Ann. § 74-8718(a)(3) (lottery)
		Kan. Stat. Ann. § 74-8810(j) (pari-mutuel betting)
Kentucky	18	Ky. Rev. Stat. Ann. § 154A.990 (lottery)

State	Age	Statute
Louisiana	21	La. Rev. Stat. Ann. §§ 47:9025(B)(2), 47:9070 (lottery)
		La. Rev. Stat. Ann. § 27:260 (casinos)
Maine	18	Me. Rev. Stat. Ann. tit. 8, §§ 275-D(7), 278 (pari-mutuel betting)
		Me. Rev. Stat. Ann. tit. 8, § 380 (lottery)
Maryland	18	Md. Code Ann., State Gov't § 9-124(b)(3) (lottery)
Massachusetts	18	Mass. Gen. Laws ch. 10, § 29 (lottery)
		Mass. Gen. Laws ch. 128A, § 10 (pari-mutuel betting)
Michigan	18	Mich. Comp. Laws § 432.29 (lottery)
	21	Mich. Comp. Laws § 432.209(9) (casinos)
Minnesota	18	Minn. Stat. § 240.13(8) (parimutuel betting)
		Minn. Stat. § 349A.12 (lottery)
Mississippi	21	Miss. Code Ann. § 97-33-21 (any gambling)
		Miss. Code Ann. § 75-76-155 (casinos)
Missouri	18	Mo. Rev. Stat. § 313.280 (lottery)
		Mo. Rev. Stat. § 313.670 (pari-mutuel betting)
	21	Mo. Rev. Stat. § 313.817 (excursion gambling boats)
Montana	18	Mont. Code Ann. § 23-5-158 (any gambling)
	18	Mont. Code Ann. § 23-7-110(3) (lottery)

State	Age	Statute
Nebraska	18	Neb. Rev. Stat. § 9-430 (Nebraska Lottery and Raffle Act)
		Neb. Rev. Stat. § 9-345 (Nebraska Pickle Card Lottery Act)
	19	Neb. Rev. Stat. § 9-646 (Nebraska County and City Lottery Act)
		Neb. Rev. Stat. § 2-1207(3) (pari-mutuel betting)
Nevada	21	Nev. Rev. Stat. 463.350 (all gambling)
New Hampshire	18	N.H. Rev. Stat. Ann. §§ 287-E:21(V), 287-F:8(II) (lottery)
		N.H. Rev. Stat. Ann. § 284:33 (pari-mutuel betting)
New Jersey	18	N.J. Stat. Ann. § 5:9-15 (lottery)
		N.J. Stat. Ann. § 5:5-65 (pari-mutuel betting)
	21	N.J. Stat. Ann. § 5:12-119 (casinos)
New Mexico	18	N.M. Stat. Ann. § 6-24-15(C) (lottery)
	21	N.M. Stat. Ann. § 11-13-1(4)(B)(1) (casinos)
New York	18	N.Y. Tax Law § 1610(a) (lottery)
North Carolina	—	No legalized gambling.
North Dakota	18	N.D. Cent. Code § 53-12-24 (lottery)
Ohio	18	Ohio Rev. Code Ann. § 3770.08(C) (lottery)
Oklahoma	18	Okla. Stat. tit. 3A § 723(D) (lottery)
		Okla. Stat. tit. 3A § 208.4(B) (pari-mutuel betting)
Oregon	18	Or. Rev. Stat. § 461.600(1) (lottery)
		Or. Rev. Stat. § 462.190 (pari-mutuel betting)

State	Age	Statute
Pennsylvania	18	72 Pa. Cons. Stat. Ann. § 3761-309(a) (lottery)
Rhode Island	18	R.I. Gen. Laws § 41-4-2 (pari-mutuel betting)
		R.I. Gen. Laws § 42-61-9 (lottery)
South Carolina	18	S.C. Code § 59-150-210(D) (lottery)
South Dakota	18	S.D. Codified Laws § 42-7A-32 (lottery tickets)
		S.D. Codified Laws § 42-7-76 (pari-mutuel betting)
	21	S.D. Codified Laws § 42-7A-48 (video lottery machines)
		S.D. Codified Laws § 42-7B-35 (limited card games and slot machines)
Tennessee	18	Tenn. Code Ann. § 4-36-310 (pari-mutuel betting)
		Tenn. Code Ann. § 4-51-122 (lottery)
Texas	18	Tex. Govt. Code Ann. § 466.3051 (lottery)
Utah	—	No legalized gambling.
Vermont	18	Vt. Stat. Ann. tit. 31, § 613 (pari-mutuel betting)
		Vt. Stat. Ann. tit. 31, §§ 661(3), 674(J)(2) (lottery)
Virginia	18	Va. Code Ann. § 58.1-4015 (lottery)
		Va. Code Ann. § 59.1-403 (pari-mutuel betting)
Washington	18	Wash. Rev. Code § 67.70.120 (lottery)

State	Age	Statute
West Virginia	18	W. Va. Code § 29-22-11(b) (lottery)
		W. Va. Code § 19-23-9(e) (pari-mutuel betting)
Wisconsin	18	Wis. Stat. § 562.06 (pari-mutuel betting)
		Wis. Stat. § 565.17(4) (lottery)
Wyoming	18	Wyo. Stat. Ann. § 11-25-109(c) (pari-mutuel betting)

APPENDIX E

STATE STATUTES ESTABLISHING A MINIMUM AGE FOR MARRIAGE WITHOUT PARENTAL OR JUDICIAL CONSENT

State	Age	Statute
Alabama	18	Ala. Code § 30-1-5
Alaska	18	Alaska Stat. §§ 25.05.011, 25.05.171
Arizona	18	Ariz. Rev. Stat. § 25-102
Arkansas	18	Ark. Code Ann. §§ 9-11-102, 9-11-208
California	18	Cal. Fam. Code § 301
Colorado	18	Colo. Rev. Stat. § 14-2-106
Connecticut	18	Conn. Gen. Stat. § 46b-30
Delaware	18	Del. Code Ann. tit. 13, § 123
District of Columbia	18	D.C. Code Ann. § 46-411
Florida	18	Fla. Stat. ch. 741.04, 741.0405
Georgia	16	Ga. Code Ann. §§ 19-3-2, 19-3-37 (those under 18 must obtain parental consent unless female applicant is pregnant or both applicants are parents of living child, in which case minimum age to marry without consent is 16)
Hawaii	18	Haw. Rev. Stat. § 572-2
Idaho	18	Idaho Code § 32-202
Illinois	18	750 Ill. Comp. Stat. 5/203
Indiana	18	Ind. Code §§ 31-11-1-4 , 31-11-1-5, 31-11-2-1, 31-11-2-3
Iowa	18	Iowa Code § 595.2
Kansas	18	Kan. Stat. Ann. § 23-106

State	Age	Statute
Kentucky	18	Ky. Rev. Stat. Ann. §§ 402.020, 402.210
Louisiana	18	La. Children's Code art. 1545, 1547 (minors may not marry without consent); La. Civil Code art. 29 (age of majority is 18)
Maine	18	Me. Rev. Stat. Ann. tit. 19-A, § 652
Maryland	16	Md. Code Ann., Fam. Law § 2-301 (those under 18 must obtain parental consent unless female applicant can present proof of pregnancy or a child, in which case minimum age to marry without consent is 16)
Massachusetts	18	Mass. Gen. Laws ch. 207 §§ 7, 24, 25
Michigan	18	Mich. Comp. Laws § 551.103
Minnesota	18	Minn. Stat. § 517.02
Mississippi	15/17	Miss. Code Ann. § 93-1-5 (female applicants must be 15; male applicants must be 17)
Missouri	18	Mo. Rev. Stat. § 451.090
Montana	18	Mont. Code Ann. §§ 40-1-202, 40-1-213
Nebraska	19	Neb. Rev. Stat. § 42-105 (minors must have parental consent to marry); *id.* § 43-2101 (defining "minor" as a person under 19)
Nevada	18	Nev. Rev. Stat. 122.020
New Hampshire	18	N.H. Rev. Stat. Ann. § 457:5
New Jersey	18	N.J. Stat. Ann. § 37:1-6
New Mexico	18	N.M. Stat. Ann. § 40-1-6
New York	18	N.Y. Dom. Rel. Law § 15

State	Age	Statute
North Carolina	18	N.C. Gen. Stat. § 51-2
North Dakota	18	N.D. Cent. Code § 14-03-02
Ohio	18	Ohio Rev. Code Ann. § 3101.01
Oklahoma	18	Okla. Stat. tit. 43 § 3
Oregon	18	Or. Rev. Stat. § 106.060
Pennsylvania	18	23 Pa. Cons. Stat. § 1304
Rhode Island	18	R.I. Gen. Laws § 15-2-11
South Carolina	18	S.C. Code Ann. § 20-1-250
South Dakota	18	S.D. Codified Laws § 25-1-9
Tennessee	18	Tenn. Code Ann. § 36-3-106
Texas	18	Tex. Fam. Code Ann. §§ 2.101–2.103
Utah	18	Utah Code Ann. § 30-1-9
Vermont	18	Vt. Stat. Ann. tit. 18, § 5142
Virginia	18	Va. Code Ann. §§ 20-45.1, 20-48, 20-49
Washington	18	Wash. Rev. Code § 26.04.210
West Virginia	18	W. Va. Code § 48-2-301
Wisconsin	18	Wis. Stat. § 765.02
Wyoming	18	Wyo. Stat. Ann. § 20-1-102

(24)

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No. 03-633
(CAPITAL CASE)

In the
SUPREME COURT OF THE UNITED STATES

DONALD P. ROPER,
Superintendent, Potosi Correctional Center
Petitioner,

v.

CHRISTOPHER SIMMONS,
Respondent.

Petition for Writ of Certiorari
to the Missouri Supreme Court

REPLY BRIEF FOR PETITIONER

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Other Authorities

Amicus Brief of American Psychological Association et al., in *Hodgson v. Minnesota*, No. 88-805, 497 U.S. 417 (1990), available at 1989 WL 1127529 ..... 9, 11
Casey, B.J. et al., *Structural and Functional Brain Development and Its Relation to Cognitive Development*, 54 Bio. Psych. 241, 248-49 (2000) 13, 14
Cauffman, Elizabeth & Laurence Steinberg, *(Im)Maturity of Judgment in Adolescence: Why Adolescents May be Less Culpable*

Than Adults, 18 Behav. Sci. & L. 741, 744 (2000) 11, 12, 19
Fagan, Jeffrey & Valerie West, *The Decline of the Juvenile Death Penalty: Scientific Evidence of Evolving Norms*, J. Crim. L. & Criminology (forthcoming Winter 2004) 6
Fischhoff, Baruch, *Risk-Taking: A Developmental Perspective in Risk Taking Behavior* 133, 148 (J.F. Yates ed. 1992) 10, 11
Furby, Lita & Ruth Beyth-Marom, *Risk Taking in Adolescence: A Decision-Making Perspective*, 12 Developmental Rev. 1, 10-11 (1992) 10, 11, 15
Goldberg, Elkhonon, *The Executive Brain: Fontal Lobes and the Civilized Mind*, 145 (2001) 18
Hoffmann, Joseph L., *On the Perils of Line Drawing: Juveniles and the Death Penalty*, 40 Hastings L.J. 229, 258 (1989) 19
Larson, Reed et al., *Mood Variability and the Psychological Adjustment of Adolescents*, 9 J. Youth & Adolescence 469, 487 (1980) 13
McGivern, Robert F., et al., *Cognitive Efficiency on a Match to Sample Task Decreases at the Onset of Puberty in Children*, 50 Brain & Cognition 73, 73-74 (2002) 14
Melton, Gary B., *Toward "Personhood" for Adolescents*, Am. Psychologist 99, 100 (Jan. 1983) 10
Moffitt, Terrie E., *Adolescence-Limited and Life-Course-Persistent Antisocial Behavior: A Developmental Taxonomy*, 100 Psych. Rev. 674, 684 (1993) 16
Nurmi, Jari-Erik, *How do Adolescents See Their*

Future?: A Review of the Development of Future Orientation and Planning, 11 Dev. Rev. 1, 19 (1991) 8
Redlich, Alison D. & Gail S. Goodman, *Taking Responsibility for an Act Not Committed: The Influence of Age and Suggestibility*, 27 L. & Hum. Behav. 141, 142 (2003) 17
Spear, L.P., *The Adolescent Brain and Age-Related Behavioral Manifestations*, 24 Neurosci. & Biobehav. Rev. 417, 419 (2000) 7, 12-14
United States Department of Commerce, Bureau of Census, Statistical Abstract of the United States (2000) 2
Waterman, Alan S., *Identity Development From Adolescence to Adulthood: An Extension of Theory and a Review of Research*, 18 Dev. Psych. 341 (1982) 10, 16

ARGUMENT

In *Gregg v. Georgia*, 428 U.S. 153 (1976), the Court used a two-step approach to evaluate the acceptability of a particular punishment under the Eighth Amendment. After looking for legislative judgments of contemporary standards (*see id.* at 175 (plurality opinion)), the Court held that "[t]he Court also must ask whether [the punishment] comports with the basic concept of human dignity at the core of the Amendment," *id.* at 182. The Court said that it would reject any punishment that the Court, in its own judgment, found to "be so totally without penological justification that it results in the gratuitous infliction of suffering." *Id.* at 183.

In rejecting the second step, the Court in *Stanford v. Kentucky*, 492 U.S. 361 (1989), expressly declined to "rest constitutional law upon [the] uncertain foundations" of indicia other than legislative acts and jury verdicts. 492 U.S. at 377.

Despite what Simmons suggests by beginning his argument with what is, in essence, the invocation of the second *Gregg* step, the Court in *Atkins v. Virginia*, 536 U.S. 304 (2002), did not reinstate the *Gregg* approach. The Court began by searching for and finding a legislative consensus. 536 U.S. at 316. The Court then merely observed that the "consensus unquestionably reflects widespread judgment about the relative culpability of mentally retarded offenders, and the relationship between mental retardation and the penological purposes served by the death penalty." *Id.* at 317. The Court did not suggest that such "judgment" and "relationship to penological purposes" have independent significance; they merely affirmed the rationality of the legislative consensus.

Here, as in *Stanford* and *Atkins*, the Court should look beyond evidence of a legislative consensus only to confirm the rationality of the consensus. It should not rest its holding on a body of untested legislative facts, assembled on appeal.

But even if the Court were to reassert the independent evaluative power it claimed in the second *Gregg* step, it should reverse the decision of the Supreme Court of Missouri. Not only is there not yet a legislative consensus for barring 17-year-olds from capital punishment, but Simmons has not shown that retaining the bar at 16 is "so totally without penological justification" (*Gregg*, 428 U.S. at 183) as to justify changing a judicially-created constitutional bar. Indeed, even the body of evidence selectively marshaled here by Simmons contains adequate support for the conclusion that the *Stanford* line is an appropriate one.

I.

The picture painted by legislative enactments and jury verdicts is not significantly different today than when the Court decided *Stanford*.

Legislation. Simmons contends that legislative action since *Stanford* paints a picture of a new consensus. He asserts that a "substantial number" of States (he says seven) have passed laws prohibiting the imposition of capital punishment on juvenile offenders. Resp. Br. 38. But as discussed in Petitioner's Brief at 22-24, only four state legislatures, representing less than 3% of the nation,[1] have passed such laws in the 15 years since *Stanford*. In *Coker v. Georgia*, 433 U.S. 584 (1977), the Court held that reinstatement by the legislatures of three States of capital punishment for a rape conviction was insufficient to show legislative acceptance of that punishment. *Id.* at 594 (plurality opinion). Similarly, here the recent experience of four States is insufficient to justify finding "such general legislative rejection of the execution of 16- or 17-year-

[1]United States Department of Commerce, Bureau of Census, Statistical Abstract of the United States (2000).

old capital murderers that a clear national consensus can be said to have developed." *Stanford*, 492 U.S. at 381-82 (O'Connor, J., concurring). And the experience of the four states is *very* recent; the oldest of these post-*Stanford* laws was enacted by Montana just five years ago (1999); Indiana enacted its law in 2002; and South Dakota and Wyoming enacted their laws only this year. Pet. Br. 22. "[I]t is myopic to base sweeping constitutional principles upon the narrow experience of the past five years." *Coker*, 433 U.S. at 614 (Burger, C.J., dissenting).

Simmons's fifth state is Washington. But there it was *State v. Furman*, 858 P.2d 1092 (Wash. 1993), not a legislative act, that set the line at age 18.

Simmons's sixth and seventh states are Kansas and New York.[2] Yet Simmons agrees that these states simply reaffirmed longstanding prohibitions – Kansas since 1935 and New York since 1963 – against imposing capital punishment on those who murder before age 18. Resp. Br. 39 nn. 79-80. *See also* Brief of New York *et al.*, 11, 14-15. Thus when this Court in *Atkins* spoke of states that had raised the minimum age for capital punishment, it did not include New York and Kansas, even though both had, since *Stanford*, returned capital punishment to their lists of available penalties. *Atkins*, 536 U.S. at 315 n.18.

When counting to seven, Simmons dismisses actions taken in Missouri and Virginia, neither of which had a minimum age for capital punishment before *Stanford*, *see* 492 U.S. at 381 (O'Connor, J., concurring), but both of which have now set the age at 16 by statute. *See* Pet. Br. 24-25; Resp. Br.

[2]Curious, in light of his decision to include Washington, is Simmons's failure to note that the New York Court of Appeals struck down the legislature's attempt to revive capital punishment as a violation of the state constitution. *See People v. Lavalle*, 2004 WL 1402516 (N.Y. June 24, 2004).

41 n.80. If by carrying over preexisting limits into new statutes New York and Kansas add to one side of the balance, Missouri and Virginia must add to the other.

Simmons also dismisses the action taken by voters in Arizona and Florida. Resp. Br. 41 n.85. But he ignores what motivated those voters.

In 1996, Arizona voters passed Proposition 102 to authorize the legislature to enact laws regarding juvenile proceedings. *State v. Davolt*, 84 P.3d 456, 479 (Ariz. 2004).[3] As discussed in Petitioner's Brief at 25-26, the purpose and effect of that amendment was to make offenders as young as 15 subject to adult penalties – which included capital punishment.

While the message sent by Florida voters is not as clear, no one can dispute that Floridians support the death penalty, and the circumstantial evidence suggests that this support extends to applying it to 17-year-old offenders. In 1994, the Florida Supreme Court struck a statute allowing the death penalty for a 15-year-old as a violation of the Florida Constitution's "cruel or unusual" punishments clause. *See Allen v. State*, 636 So.2d 494 (Fla. 1994).[4] In 1998 voters approved a constitutional amendment changing this clause to

[3]The court in *Davolt* held only that the state statute requiring any 15 to 17-year-old charged with murder to be automatically tried as an adult was unconstitutional under *Thompson v. Oklahoma*, 487 U.S. 815 (1988), because there was no provision for a prior, individualized assessment of the juvenile's maturity and moral responsibility at the time of the offense. *Davolt*, 84 P.3d at 481. But the court was quick to "emphasize" that it was not "preclud[ing] the State from seeking the death penalty against juvenile defendants." *Id.*

[4]The Florida Supreme Court had also narrowly rejected a claim that use of the electric chair was "cruel or unusual." *See Jones v. State*, 701 So.2d 76 (Fla. 1997).

read, "cruel and unusual." *See Brennan v. State*, 754 So.2d 1, 6 n.4 (1999) (holding that death sentence imposed on 16-year-old murderer was "cruel or unusual"); *Armstrong v. Harris*, 773 So.2d 7, 9 (Fla. 2000).[5] The Florida Supreme Court struck down this voter-approved amendment on procedural grounds in *Armstrong v. Harris*, then later relied on *Brennan* to set aside the death sentence imposed on a 16-year-old murderer because the sentence was "cruel or unusual." *See Ferrell v. State*, 772 So.2d 1218 (Fla. 2000). In 2002, the voters again approved the amendment, effectively reversing *Ferrell, Brennan*, and *Allen*.[6]

Even counting Kansas, New York, and Washington among the states that have raised the minimum age since *Stanford*, seven states are substantially fewer than the number this Court relied on to find a recently-developed consensus in *Atkins*: 18 States had legislatively barred imposition of capital punishment on mentally retarded defendants since *Penry v. Lynaugh*, 492 U.S. 302 (1989), and no State had passed any law to the contrary. *Atkins*, 536 U.S. at 314-16. The contrast with the record on minimum age was drawn by the Court itself. *Id.* at 315 n.18.

Jury verdicts. When Simmons addresses the other, more problematic, source of objective evidence of popular standards, jury verdicts (Resp. Br. 45), he relies heavily on a forthcoming article arguing that a very recent decline in the

[5]The text of the amendment also provided that the "death penalty is an authorized punishment" and that both the "cruel or unusual" and "cruel and unusual" clauses "shall be construed in conformity with decisions of the United States Supreme Court." *See Armstrong*, 773 So.2d at 16 n.25.

[6]Petitioner's opening brief (p. 26) refers to the 2002 vote. Simmons suggests that a reference to *Allen v. State* (instead of *Brennan v. State*) contained on that page was incorrect. Resp. Br. 41 n.85. But the 1998 vote in which the amendment was originally adopted occurred before *Brennan* was decided.

number of juvenile death sentences is evidence of "an emerging societal norm" against such executions. Jeffrey Fagan & Valerie West, *The Decline of the Juvenile Death Penalty: Scientific Evidence of Evolving Norms*, J. Crim. L. & Criminology (forthcoming Winter 2004).[7] But the authors concede that several factors – ones that either cannot be statistically measured or for which no statistics were available – affected their ability to make any far-reaching conclusion. *Id.* at 317. They admit that prosecutors' charging decisions are beyond the capability of social science to study. *Id.* at 7. They compare juvenile death sentences to the total number of homicide arrests, but fail to ask whether the homicides were capital offenses. *Id.* at 27, 30. They concede the absence of arrest data specific to 16- and 17-year-old offenders. *Id.* at 30 n.73. In short, they do not "indicate how many juries have been asked to impose the death penalty for crimes committed [at age 16 or 17], or how many times prosecutors have exercised their discretion to refrain from seeking the death penalty in cases where the statutory prerequisites might have been proved." *Thompson v. Oklahoma*, 487 U.S. 815, 853 (1988) (O'Connor, J., concurring in judgment).

Such statistics also fail to account for the inherently individual factual distinctions among cases with respect to the crimes themselves and the individual defendants. Ultimately, juries decide whether to impose a death sentence not based on their policy judgment concerning the death penalty for those who offend before turning 18, but on the facts of a particular case against a particular defendant. We still lack data that

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[7] Actually, the article confirms that that the number of juvenile death sentences fluctuates greatly, from highs of 18 (1994), 14 (1999), 13 (1995), and 12 (1996), to lows of 2 (2003), 4 (2002), and 5 (1991), *id.* at 16 – not the kind of consistent trend that Simmons suggests. And the authors concede that more juvenile death sentences have been imposed after *Stanford* than in the decade before it. *Id.* at 18 n.63.

would "allow [the Court] reliably to infer that juries are or would be significantly more reluctant to impose the death penalty on [16- or 17-year-olds] than on similarly situated older defendants." *Id.* (emphasis added).

II.

The untested collection of legislative facts that Simmons presents does not eliminate the rational bases for laws that conform to *Stanford*.

In his point I, Simmons essentially argues that the choice to make capital punishment available for a 17-year-old murderer is "so totally without penological justification" (*Gregg*, 428 U.S. at 183) that it cannot rationally be made by thoughtful legislators. Whether he means to ask that the Court revive the two-part *Gregg* approach, or merely that the Court confirm what Simmons sees as a new, post-*Stanford* consensus, the untested collection of publications he compiles – a collection more suited to legislative factfinding than to appellate decision-making – is insufficient. Indeed, that collection, particularly when expanded to include reports referenced within it, provides more than adequate support for affirming *Stanford* and permitting legislatures to retain capital punishment as an option for the jury's consideration when a 17-year-old commits a truly heinous crime.

"Adolescent." The inadequacy of Simmons's case begins with undefined use of "adolescence" – a term that "eludes precise characterization." L.P. Spear, *The Adolescent Brain and Age-Related Behavioral Manifestations*, 24 Neurosci. & Biobehav. Rev. 417, 419 (2000). "There are numerous physiological and socio-behavioral transitions that occur during the age span between childhood and adulthood, with the timing of these transitions varying according to nutritional status as well as sociocultural values and economic conditions in

humans." *Id.* Though some use ages 12-18 to roughly approximate "adolescence," "[t]here is less consensus as one approaches the 'gray zones' at the margins of this age range." *Id.* In fact, the "entire second decade is not in-frequently considered adolescence, and even ages up to 25 years have been considered as late adolescence by some researchers." *Id.* at 419 (citations omitted). To the extent adolescence is defined based on physiological development, its definition will be affected by ongoing research, such as recent studies using "magnetic resonance imaging (MRI) of cortex" showing that brain development does not "approximat[e] average adult levels until 20 years of age." *Id.* at 439. Thus when Simmons argues against capital punishment for "adolescents," we cannot be sure that his "evidence" would not demand a bright line at 20 or even 25.[8] More important, his imprecision – and that of many of his authorities – leaves the door open for legislators to choose 16 or 17, not just 18 or a higher age.

Adolescent decision-making. Studies of adolescent decision-making reach conflicting results – some of them supporting Simmons, others supporting legislatures that retain the *Stanford* line. The contrasting conclusions are demonstrated in amicus briefs filed by the American Psychological Association.

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[8]If "adolescence" ends near 18, many of Simmons's authorities fail to provide him specific support, for they compare younger-than-adolescent groups with older-than-adolescent ones, without giving useful data as to the critical middle ground. *See, e.g.*, studies comparing "children" with "adults" (B.J. Casey, et al., *Structural and Functional Brain Development and Its Relation to Cognitive Development*, 54 Bio. Psych. 241, 248-49 (2000)); comparing 6 children between 9 and 11 with 6 "adults" (*id.* at 247, 250); comparing 9 children, ages 7-12, with 9 young adults, ages 21-24 (*id.* at 250-51). The Cartron-Guerin study (cited in Jari-Erik Nurmi, *How do Adolescents See Their Future?: A Review of the Development of Future Orientation and Planning*, 11 Dev. Rev. 1, 19 (1991)) speaks of "older adolescents," but studied those aged 12-15.

Here, the Association argues that 17-year-olds are not sufficiently mature to be fully responsible for murder; the Association opposes capital punishment for anyone under age 18 because of their "[d]evelopmentally immature decision-making, paralleled by immature neurological development." Brief of APA, *et al.*, at 2. But the Association took a different position when addressing the availability of abortion to juveniles without parental involvement. In its amicus brief[9] in *Hodgson v. Minnesota*, No. 88-805, 497 U.S. 417 (1990), the Association pointed out that "[d]evelopmental psychologists have built a rich body of research examining adolescents' capacities for understanding, reason, solving problems and making decisions, especially in comparison to the same capacities in adults."[10] Based on that "rich body of research," the Association concluded that long before age 18, juveniles have the maturity to decide whether to obtain an abortion without parental involvement:

> Research consistently supports the conclusion that there is a predictable development during late childhood and early adolescence of the capacity to think rationally about increasingly complex problems and decisions.
>
> * * * *
>
> In fact, by middle adolescence (age 14-15) young people develop abilities similar to adults in reasoning about moral dilemmas, understanding social rules and laws, [and] reasoning about interpersonal relationships and interpersonal problems . . . . Thus by age 14 most adolescents have developed adult-like intellectual and social capabilities including specific abilities outlined in the law as necessary for understanding treatment alternatives, considering risks and benefits, and giving

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[9]Available at 1989 WL 1127529.

[10]*Id.* at 23.

legally competent consent.

Id. at 23-24 (footnotes omitted).

Also referring to that "rich body of research," Gary B. Melton pointed out that "existing literature clearly suggests that, for most purposes, adolescents cannot be distinguished from adults on the ground of competence in decision making alone," and "that ages 11 to 14 should be viewed as a transition period in the development of important cognitive and social abilities; youth in this age group might be competent as decision makers in some contexts." Gary B. Melton, *Toward "Personhood" for Adolescents,* Am. Psychologist 99, 100 (Jan. 1983). Lita Furby and Ruth Beyth-Marom describe a study showing "that 14-year-olds could not be distinguished from adults on such competency criteria as evidence of choice, reasonable outcome of choice, reasonable decision-making process, and understanding of facts." Lita Furby & Ruth Beyth-Marom, *Risk Taking in Adolescence: A Decision-Making Perspective*, 12 Developmental Rev. 1, 10-11 (1992). L.P. Spear points out that "[e]arly adolescence in humans is associated with a major transformation of cognitive thought leading to abstract reasoning." Spear, *supra,* at 423. She confirms that there is only a "small difference in decision making capacity between individuals from mid-adolescence onward." *Id.*[11]

Elizabeth Cauffman and Lawrence Steinberg point to a dearth of evidence in that "rich body of research" to support Simmons's argument that there is no longer a rational basis for

[11]Some of the differences researchers have found among groups are based on gender (Alan S. Waterman, *Identity Development From Adolescence to Adulthood: An Extension of Theory and a Review of Research,* 18 Dev. Psych. 341 (1982)), or even economic status (*see* Baruch Fischhoff, *Risk-Taking: A Developmental Perspective in Risk Taking Behavior* 133, 148 (J.F. Yates ed. 1992)), rather than age.

Stanford line: "[T]here, is little evidence that growth in the logical abilities relevant to decision-making occurs in any systematic way much past age 16." Elizabeth Cauffman & Laurence Steinberg, *(Im)Maturity of Judgment in Adolescence: Why Adolescents May be Less Culpable Than Adults,* 18 Behav. Sci. & L. 741, 744 (2000) (citation omitted). "Overall, there is little evidence from studies of *cognitive* development to support the assertion that adolescents, once they have turned 16, should be viewed as less culpable than adults." *Id.* (emphasis in original).

Ultimately, Simmons wants the Court to declare that the *Stanford* line is now "without penological justification" not based on research that uniformly reaches that conclusion, but based on inconsistent research, viewed through the lense of a stereotype that the American Psychological Association decried in *Hodgson*: "[T]he assumption that adolescents as a group are less able than adults to understand, reason and make decisions about intellectual and social dilemmas is not supported by contemporary psychological theory and research." 1989 WL 1127529 at 26. He fails to recognize that the "significant numbers of psychosocially mature *and* immature adolescents suggest that it is imperative to consider individual differences, rather than simply age, when assessing decision-making ability or maturity of judgment among adolescents." Cauffman & Steinberg, *supra,* at 757 (emphasis in original). But that is precisely what legislatures in Missouri and elsewhere have recognized, though that recognition has led, so far, to mixed results.

Adolescents as risk-takers. "Although there is little empirical research on adolescent decision making and risk taking, there is no paucity of beliefs about how to characterize adolescent behavior in these areas." Furby & Beyth-Marom, *supra*, at 9. One researcher described such beliefs as "an established bit of folk wisdom." Fischhoff, *supra,* at 133. But

because the existing evidence does not support the contention that adolescents are prone to "irrational" risky behavior, that contention cannot bar legislatures from setting the minimum age at 16.

Some of the perception of adolescents as risk-takers is the result of applying adult paradigms. One researcher "used decision making theory to explore risk taking in adolescence" and "concluded that risk taking during adolescence represents 'an optimal life-span pattern for a rational decision maker who must gain knowledge of self and environment through experience.'" Spear, *supra,* at 422. In other words, it is rational for adolescents to experiment to a degree greater than adults, to gain knowledge and experience. Moreover, the risks of some behaviors are rationally less during adolescence than later; behavior that would be irrational for an adult may be rational for an adolescent, and vice versa.

Again, it is not that adolescents are ignorant of risks. "In fact, there is substantial evidence that adolescents are well aware of the risks they take...." Cauffman & Steinberg, *supra*, at 744. Cauffman and Steinberg expressly reject the premise "that, as a class, adolescents are irresponsible, solipsistic, or reckless in any absolute sense." *Id*. at 757. They remind us that "responsibility, perspective, and temperance – the three components of maturity of judgment... – are more predictive of antisocial decision-making than chronological age alone," and observe that "psychosocially mature 13-year-olds demonstrate less antisocial decision-making than psychosocially immature adults." *Id*. Standing alone, that conclusion would not justify lowering the *Stanford* line. But it adds to the reasons to retain it.

Emotional control. Simmons suggests that adolescents' moodiness casts doubt on their ability to make rational decisions. Resp. Br. at 18-19 & n. 25. His evidence for that claim

is a 1980 report. And that report itself suggests limits on the "moody" characterization: "Recent research has cast doubt on the image of the adolescent years as a period of turmoil. The evidence for emotional turmoil suggests that it occurs in early adolescence and is confined to girls." Reed Larson et al., *Mood Variability and the Psychological Adjustment of Adolescents,* 9 J. Youth & Adolescence 469, 487 (1980). Again, legislators could reasonably conclude that by exempting those in "early adolescence" from capital punishment, they have excluded the class of those who are subject to emotional turmoil to a degree that merits differential treatment.

Neurological research. To the extent Simmons points to insights gained from a new, post-*Stanford* body of research, he points to recent studies of physical brain development made possible by the increasing sophistication of magnetic resonance imaging (MRI). But missing is compelling, specific proof of the connection between the MRI results and behavioral maturity. That the brain and behavior both change during any portion of adolescence does not prove a connection; "correlated developmental events cannot be used to infer causality." Spear, *supra,* at 439.

The Court should not accept at face value Simmons's sweeping assertions of such connections; the authorities that Simmons cites are often far less definitive. Among those assertions is his statement that a particular "shift in the composition of the brain helps the brain work faster and more efficiently." Resp. Br. 22. To support this particular statement, Simmons cites B.J. Casey et al., *Structural and Functional Brain Development and its Relation to Cognitive Development*, 54 Bio. Psych. 241 (2000), and includes in a parenthetical a correct but more limited statement: "myelination and synaptic pruning '*coincide* with the continued development of cognitive

capacities.'" Resp. Br. 22 n.41 (emphasis added.)[12] Again, to "coincide" is not enough.

Moreover, the Casey text itself is an example of the uncertainty of many of the conclusions Simmons relies upon. Unlike Simmons, Casey consistently uses qualified terms: "the prefrontal cortex and related circuitry *have been implicated*"; "evidence of prolonged development...*may suggest* an important parallel"; "processes *may* represent." Casey, *supra*, at 245-46 (emphasis added).

Another of Simmons's authorities, referring to the key element of cognition, explains that connections between brain development and mental ability are merely "assumed," for "little is known in children and adolescents about the specific relationship between these structural changes [in the brain] and cognition." Robert F. McGivern et al., *Cognitive Efficiency on a Match to Sample Task Decreases at the Onset of Puberty in Children*, 50 Brain & Cognition 73, 73-74 (2002).[13] Such assumptions may be appropriate bases for legislative choices, but not for judicial ones.

Peer pressure. It is certainly curious that a man who himself led a peer to commit a heinous, premeditated murder would claim that legislators cannot rationally apply capital punishment to him because adolescents generally are peer-influenced. But that claim would be a weak one regardless: it

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[12]Spear refers specifically to the "pruning" that captures Simmons's imagination. Resp. Br. 21. But Spear does not project that "pruning" into the period between the *Stanford* rule and the one Simmons desires: "this pruning . . . appears to occur largely after 7 years and prior to 16 years of age." Spear, *supra*, at 439.

[13]McGivern further points out that some studies connect cognition and puberty (*id.* at 86-87) – pointing again to a period within the *Stanford* rule.

is based not on proven fact, but on the "myth of adolescent peer culture." Furby & Beyth-Marom, *supra*, at 23 (quoting F. Elkin & W.A. Wesley, *The Myth of the Adolescent Peer Culture*, 20 Am. Soc. Rev. 680-84 (1955)). Myths cannot be a basis for barring legislatures from weighing uncertain and inconsistent research. And actual research into "real-life decision making question[s] the degree to which adolescents are more peer-conforming than other ages." Furby & Beyth-Marom, *supra*, at 22.

Certainly "adolescents may care very much what their peers think of them." *Id.* at 23. But the question cannot be merely whether 17-year-olds care what peers think; it must be whether they are so likely to *act* based on peer influence that they should not be held fully responsible for their actions. "In most studies, perception of influence has been measured, but actual influence of behavior has not been assessed." *Id.* And where behavior has been studied, it does not necessarily follow peer influence. *See id.*

That youth generally are in "a time and condition of life when a person may be most susceptible to influence (*Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982), cited in Resp. Br. 24) did not not justify declaring every 17-year-old exempt from capital punishment in *Stanford*; nor can it do so today. Not all juveniles are in positions where such influences play a significant role. And particularly not those as old as Simmons: "Relevant empirical work includes laboratory evidence that conformity peeks at early adolescence" (Furby & Beyth-Marom, *supra*, at 22), *i.e.*, well before age 17.

Character. Claiming that capital punishment should not be available until a murderer's "character" or "identity" are fully formed, Simmons refers to Justice O'Connor's concurring opinion in *California v. Brown*, 479 U.S. 538, 544-46 (1987). Resp. Br. 26. But Justice O'Connor's statement about the need

to evaluate "the defendant's background and character" was made to ensure "individualized assessment" (*id.* at 545) not to preclude it. And to preclude it as to 17-year-olds would be particularly curious because the research on the formation of "character" and "identity" do not (and perhaps cannot, given the imprecision of the terms) establish when "character" or "identity" is formed. One authority Simmons cites suggests that even 18 is premature, concluding that "[i]t is during the college years that the greatest gains in identity appear to occur." Waterman, *supra,* at 348. Other research, by contrast, shows that one type of character – antisocial personality disorder – "is fixed sometime before age 18." Terrie E. Moffitt, *Adolescence-Limited and Life-Course-Persistent Antisocial Behavior: A Developmental Taxonomy,* 100 Psych. Rev. 674, 684 (1993). Legislators may rationally fix upon the establishment of personality disorders in mid-adolescence, rather than defer all adult punishment until the mid-20's on the theory that character is still unformed.

Individualized assessment. Forced to concede that some 17-year-olds have capacity to match that of culpable adults, Simmons maintains that "individualized assessment," though required elsewhere to identify those who should be subject to the most severe penalties, is uniquely incapable of addressing juveniles charged with capital crimes. His argument is difficult to reconcile with *Atkins*, which is premised on the ability of courts and juries to make such assessments.

And identifying the "particularly precocious adolescent" (Resp. Br. 30) for whom Simmons implicitly concedes capital punishment is constitutionally available is not significantly more difficult than identifying others who commit crimes and are tried years later, after physical or mental changes. Simmons's argument belittles the ability of jurors, all of whom have experience as teenagers. Certainly, jurors must look back at facts that occurred when the defendant was – and appeared –

younger. But that is no harder than looking back at the mental condition of one who claims to have been insane at the time of the crime, but who has regained competence.

Simmons claims that individualized assessment is problematic for juveniles because the assessment may consider confessions, and adolescents are more likely than adults to falsely confess to crimes. Resp. Br. 32 & n.66. But his evidence is not persuasive; the premise has not been rigorously tested. *See* Alison D. Redlich & Gail S. Goodman, *Taking Responsibility for an Act Not Committed: The Influence of Age and Suggestibility*, 27 L. & Hum. Behav. 141, 142 (2003) ("whether younger suspects are more likely than older suspects to falsely admit guilt has not been scientifically determined"). Indeed, "it is difficult, if not impossible, to conduct ethical, scientifically sound research on false confessions to actual criminal acts." *Id.* The study that Simmons cites tested whether adolescents were likely to falsely take responsibility for near-trivial mischief. *Id.* at 142-43. Its authors recognize that juveniles may have falsely confessed "because of the nonseriousness of the situation"; the seriousness of the situation plays a role in an adolescent's reaction to a false suggestion of responsibility. *Id.* at 152-53.

And Simmons cites no support for his implicit claim that all adolescents are affected by this or any other deficiency in their reaction to police inquiry. As Justice O'Connor recently observed, "17 ½-year-olds vary widely in their reactions to police questioning, and many can be expected to behave as adults." *Yarborough v. Alvarado,* 124 S.Ct. 2140, 2152 (2004) (O'Connor, J., concurring). That some behave incorrectly in some circumstances cannot be an adequate basis for barring individualized determinations of their maturity.

Age 18 as a bright line. At the conclusion of his point, Simmons leaves the realm of uncertain, qualified, and

conflicting legislative facts. But by concluding his point with a recitation of other areas where legislatures have chosen 18 as a bright line (Resp. Br. 35-36), Simmons implicitly highlights the fact that none of his psychological and physiological authorities or arguments justify that particular line.

And looking at such other statutes, setting minimum ages for granting privileges, provides little enlightenment. We do not know precisely what prompts legislators to pick 15 or 16 for driving, or 18 or 21 for drinking. But it seems obvious that legislators draw bright lines largely for administrative convenience – because they deem many privileges simply not to be worth the cost and complexity of "individualized assessment." As the science evolves – or perhaps even the maturation patterns of youth change (*see* Elkhonon Goldberg, *The Executive Brain: Fontal Lobes and the Civilized Mind*, 145 (2001)) – legislatures may set such lines at different ages. But based on current knowledge, legislatures can rationally conclude that for capital punishment, the bright line should be set at 16, and that beyond 16 the question is too defendant - and fact-specific to remove it from the hands of juries.

The Atkins *contrast.* Of course, Simmons would prefer this entire discussion; he, like the Missouri Supreme Court, would simply equate juveniles with the mentally retarded and demand the protection granted in *Atkins*. But the two groups differ at the outset by virtue of how they are defined.

The "mentally retarded" whose sentencing is ruled by *Atkins* consist "by definition" only of those with "diminished capacities to understand and process information, to communicate, to abstract from mistakes, to control impulses, and to understand the reactions of other." *Atkins*, 536 U.S. at 318. That group is thus defined by the very criteria that make the application of capital punishment to them "without penological justification" (*Gregg*, 428 U.S. at 183). There can

never be a member of that group for whom capital punishment would be appropriate.

Juveniles, by contrast, are defined solely on the basis of age – at the very most a rough proxy for maturity. *See* Joseph L. Hoffmann, *On the Perils of Line Drawing: Juveniles and the Death Penalty*, 40 Hastings L.J. 229, 258 (1989). As observed in one of Simmons's authorities, studying youth from "a developmental perspective...reveals the inherent inadequacy of policies that draw bright-line distinctions between adolescence and adulthood. Indeed, an analysis of the developmental literature indicates that variability among adolescents of a given chronological age is the rule, not the exception." Cauffman & Steinberg, *supra*, at 759.

It may be that "the age differences observed" in decision making abilities "are *appreciable* enough to warrant drawing a legal distinction. They may not, however, be *consistent* enough, since significant numbers of adolescents exhibit high enough levels of maturity of judgment to outperform less mature adults." Cauffman & Steinberg, *supra*, at 758 (emphasis in original). Again, those "significant numbers of adolescents" give legislators a sufficient penological justification for retaining capital punishment as a sentencing option for those who commit the most heinous crimes shortly before turning 18.

CONCLUSION

For the reasons stated above and in Petitioner's Brief, the decision of the Supreme Court of Missouri should be reversed.

Respectfully submitted,

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No. 03-633

IN THE

Supreme Court of the United States

DONALD P. ROPER, SUPERINTENDENT, POTOSI CORRECTIONAL CENTER,

Petitioner,

v.

CHRISTOPHER SIMMONS,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF MISSOURI

BRIEF OF *AMICI CURIAE* FORMER U.S. DIPLOMATS MORTON ABRAMOWITZ, STEPHEN W. BOSWORTH, STUART E. EIZENSTAT, JOHN C. KORNBLUM, PHYLLIS E. OAKLEY, THOMAS R. PICKERING, FELIX G. ROHATYN, J. STAPLETON ROY, AND FRANK G. WISNER IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Is the imposition of the death penalty on a person who commits a murder at age seventeen "cruel and unusual," and thus barred by the Eighth and Fourteenth Amendments?

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Atkins v. Virginia, 536 U.S. 304 (2002) 1, 6, 27

Napoleon Beazley v. United States, Case 12.412, Report No. 101/03, 29 Dec. 2003 14

Coker v. Georgia, 433 U.S. 584 (1977) 28

Crosby v. National Foreign Trade Council, 530 U.S. 363 (2000) 20

Michael Domingues v. United States, Case 12.285, Report No. 62/02, 22 October 2002 13

Enmund v. Florida, 458 U.S. 782 (1982) 27

Estelle v. Gamble, 429 U.S. 97 (1976) 6

Grutter v. Bollinger, 539 U.S. 306 (2003) 28

Lawrence v. Texas, 539 U.S. 558 (2003) 28

McIntyre v. Ohio Elections Comm'n, 514 U.S. 334 (1995) 28

The Paquete Habana, 175 U.S. 677 (1900) 6, 7

Raines v. Byrd, 521 U.S. 811 (1997) 28

United States v. Smith, 18 U.S. (5 Wheat.) 153 (1820) 6

Sosa v. Alvarez Machain, 124 S. Ct. 2739 (2004) 7

Thompson v. Oklahoma, 487 U.S. 815 (1988) 27

Trop v. Dulles, 356 U.S. 86, 101 (1958) 26, 27

Washington v. Glucksberg, 521 U.S. 702 (1997) 28

Constitutional Provisions

U.S. Const. amend. VIII 2

U.S. Const. amend. XIV 2

Other Sources

The Abolition of Capital Punishment, Res. 1044, Eur. Parl. Ass., 25th Sitting (Oct. 4, 1994) 13

An Act to Prohibit Capital Punishment of Juvenile Offenders, SB 182, S. Dak. 2004 Sess. (Feb. 6, 24, 2004) 19

Letter from the Ambassador of Spain, Ambassador of Denmark, and the Delegation of the European Commission, to the Texas Board of Pardons and Paroles (May 7, 2002) 21

American Bar Association, *Beazley Execution: Assembly President Calls for Clemency*, Aug. 10, 2001 25

American Bar Association, *Juvenile Offender Napoleon Beazley Facing Execution in Texas* 21

American Bar Association, *Juvenile Death Penalty: Scott Hain* 16

Amnesty International, *Children and the Death Penalty: Executions Worldwide Since 1990*, ACT 50/007/2002 ..... 14, 15, 23

Amnesty International, *The Death Penalty Worldwide: Developments in 2003*, ACT 50/007/2004 ..... 15, 16, 17

Amnesty International, *Execution of Child Offenders: Updated Facts and Figures*, POL 3-/007/2004 (Feb. 16, 2004) 17, 18

Amnesty International, *Facts and Figures on the Death Penalty*, ACT 50/005/2003 14

Amnesty International, *Facts and Figures on the Death Penalty*, ACT 50/008/2004 ..... 15, 16, 17

Amnesty International, *United States of America – Too Young to Vote, Old Enough to be Executed: Texas Set to Kill Another Child Offender*, July 2001 24

Annual Report of the Inter-American Commission on Human Rights 2002, Report N° 62/02, Case 12.285, Michael Domingues v. United States 22

Annual Report of the Inter-American Commission on Human Rights 2003, Report N° 97/03, Case 11.193, Gary T. Graham (now known as Shaka Sankofa) 22

Annual Report of the Inter-American Commission on Human Rights 2003, Report N° 101/03, Case 12.412, Napoleon Beazley 22

Harry A. Blackmun, *The Supreme Court and the Law of Nations*, 104 Yale L.J. 39 (1994) 27

China Hits Back on Human Rights, Reuters, Apr. 3, 2003 26

Council of Europe, Res. 1253 (June 25, 2001) 22

Council of Europe Appeals on Behalf of U.S. Inmate Sentenced as a Teen-Ager to Die, Associated Press, Aug. 15, 2001 24

A Covenant with Death, The Economist, May 12, 2001 23

Richard C. Dieter, Executive Director, Death Penalty Information Center, *International Perspectives on the Death Penalty: A Costly Isolation for the U.S.* (Oct. 1999) 23

Europe Outraged Over Graham Execution, CBS News, June 23, 2000 ..... 24, 25

European Union, *The EU's Human Rights & Democratisation Policy: Abolition of the Death Penalty* 13

European Union, *European Union in the U.S.: EU Memorandum on the Death Penalty* 12

European Union, *European Union in the U.S.: EU Policy and Action on the Death Penalty* 21

European Union, *European Union in the U.S.: Guidelines to EU Policy Towards Third Countries on the Death Penalty*, June 3, 1998 12

Europeans Deplore Executions in the U.S., N.Y. Times, Feb. 26, 2000 25

French Lawmaker Denounces United States' Use of Death Penalty, Associated Press Worldstream, June 10, 2000 25

Louis Henkin, *A Decent Respect to the Opinions of Mankind*, 25 J. Marshall L. Rev. 215 (1992) 27

High Commissioner for Human Rights Expresses Concerns About Scheduled Execution of Two Juvenile Offenders in United States, UN Press Release, June 23, 2000 9

Human Rights Committee, General Comment No. 24 (52), U.N. Doc. A/50/40, Vol. I (1995), Annex V 12

Human Rights Committee, U.N. Doc A/50/40, paras. 279, 292, originally issued as U.N. Doc. CCPR/C/79/Add.50 (1995) 12

Human Rights Watch, *U.S.: The Death Penalty and Juvenile Offenders* 18

Information Office of the State Council of the People's Republic of China, Human Rights Record of the United States in 2003 (Mar. 1, 2004) 26

The International Justice Project, *Reported Worldwide Executions of Juveniles Since 1990* 17

Marcus Mabry, *A Bad Case of Euro Envy: The Rift Between U.S. and Old World Values is Threatening America's Claim to Global Leadership*, Newsweek, Apr. 16, 2001 ..... 23, 26

Stephan M. Minikes, *Right of Reply: Intervention on the Death Penalty, delivered to the Permanent Council of The Organization for Security and Cooperation in Europe (OSCE)*, July 25, 2002 24

Norwegian Ministry of Foreign Affairs, *Norway Asks USA to Pardon American on Death Row*, Press Release, Feb. 8, 2001 24

Note by the Secretary General, Annexed with a Report of the Special Rapporteur of the Commission on Human Rights on Extrajudicial, Summary or Arbitrary Executions, U.N. GAOR, 51st Sess., U.N. Doc. A/51/457 (1996) 10

Office of the High Commissioner for Human Rights, *Status of Ratifications of the Principal International Human Rights Treaties* 7

The Question of the Death Penalty, U.N. CHR, 59th Sess., U.N. Doc. E/CN.4/RES/2003/67 (2003) 8

The Question of the Death Penalty, U.N. CHR, 58th Sess., para. 4, U.N. Doc. E/CN.4/RES/2002/77 (2002) 8

The Question of the Death Penalty, U.N. CHR, 57th Sess., U.N. Doc. E/CN.4/RES/2001/68 (2001) 8

The Question of the Death Penalty, U.N. CHR, 56th Sess., U.N. Doc. E/CN.4/RES/2000/65 (2000) 8

The Question of the Death Penalty, U.N. CHR, 55th Sess., U.N. Doc. E/CN.4/RES/1999/61 (1999) 8

The Question of the Death Penalty, U.N. CHR 54th Sess., U.N. Doc. E/CN.4/RES/1998/8 (1998) 8

The Question of the Death Penalty, U.N. CHR 53rd Sess., U.N. Doc. E/CN.4/RES/1997/12 (1997) 8

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Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, U.N. CHR, 57th Sess., U.N. Doc. E/CN.4/2001/9 (2001) 9-10

Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, U.N. CHR, 56th Sess., U.N. Doc. E/CN.4/2000/3 (2000) 10

Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, U.N. CHR, 55th Sess., U.N. Doc. E/CN.4/1999/39 (1999) 10

Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, U.N. CHR, 54th Sess., U.N. Doc. E/CN.4/1998/68 (1997) 10

Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, U.N. CHR, 53rd Sess., U.N. Doc. E/CN.4/1997/60 (1996) 10

Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, U.N. CHR, 51st Sess., U.N. Doc. E/CN.4/1995/61 (1994)..... 10, 11

Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, U.N. CHR, 50th Sess.U.N. Doc. E/CN.4/1994/7 (1993) 10, 11

Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, U.N. CHR, 49th Sess., U.N. Doc. E/CN.4/1993/46 (1992) 10, 11

Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions on a Mission to the United States of America, U.N. ESCOR, 54th Sess., UN Doc. E/CN.4/1998/68/Add.3 (1998) 10

Report of the Special Rapporteur on Extrajudicial, Summary, or Arbitrary Execution, U.N. CHR, 59th Sess., U.N. Doc. E/CN.4/2003/3/Add.1 (2003) 10

Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, U.N. CHR, 58th Sess., U.N. Doc. E/CN.4/2002/74 (2002) 10

Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, U.N. CHR, 57th Sess., U.N. Doc. E/CN.4/2001/9 (2001) 10

Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, U.N. CHR, 56th Sess., U.N. Doc. E/CN.4/2000/3 (2000) 10, 11

Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, U.N. CHR, 55th Sess., U.N. Doc. E/CN.4/1999/39 (1999) 10

Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, U.N. CHR, 55th Sess., U.N. Doc. E/CN.4/1999/39/Add.1 (1999) 11

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Restatement (Third) of Foreign Relations Law of the United States § 102 (1987)..... 13

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William Schabas, *The Abolition of the Death Penalty in International Law* (1997)..... 23

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Situation of Human Rights in the Democratic Republic of Congo, U.N. CHR, 59th Sess., U.N. Doc. E/CN.4/RES/2003/15 (2003) 17

Status of the International Covenants on Human Rights, Question of the Death Penalty, U.N. CHR, 59th Sess., U.N. Doc., E/CN.4/2003/106 (2003) 15

Victor Streib, *The Juvenile Death Penalty Today: Death Sentences and Executions for Juvenile Crimes, January 1, 1973-April 30, 2004* (May 4, 2004) 11, 19

United Nations Commission on Crime Prevention and Criminal Justice, *Capital Punishment and Implementation of the Safeguards Guaranteeing Protection of the Rights of those Facing the Death Penalty: Report of the Secretary-General*, U.N. Doc. E/CN.15/2001/10 (2001) 12

United Nations Economic and Social Council, *Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty*, E.S.C. Res. 1984/50, U.N. ESCOR, U.N. Doc. E/RES/1984/50 (1984) 6

United Nations Sub-Commission on the Promotion and Protection of Human Rights, *The Death*

Penalty, Particularly in Relation to Juvenile Offenders, 52d Sess., Res. 1999/4, U.N. Doc. E/CN.4/SUB.2/RES/1999/4 (1999) 7

United Nations Sub-Commission on the Promotion and Protection of Human Rights, *The Death Penalty, Particularly in Relation to Juvenile Offenders*, 53d Sess., Res. 2000/17, U.N. Doc. E/CN.4/Sub.2/RES/2000/17 (2000) 7

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae have served as diplomats representing the government of the United States at home and abroad in both Republican and Democratic administrations. Four *amici* (Abramowitz, Pickering, Roy, Wisner) retired with the rank of Career Ambassador, the highest rank that can be awarded to members of the United States Foreign Service. *Amici* submit this brief to advise this Court about the views and practices of nations with which *amici* are particularly well acquainted, and the likely impact that Missouri's continuing administration of the death penalty against juveniles would have upon our diplomatic relations with foreign governments and upon our standing in the international community.

Some of the signatories to this brief oppose the administration of the death penalty principally with respect to the execution of juvenile offenders; others oppose its application in all circumstances.[2] But all *amici* agree upon three basic principles: first, that the current practice of executing juveniles is inconsistent with minimum standards of decency shared by nearly all nations of the world; second, that the continuation of this practice by a few states in the United States strains diplomatic relations with close American allies, increases America's diplomatic isolation, and impairs important U.S. foreign policy interests at a critical time; and third, that these considerations (along with

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[1] Pursuant to Sup. Ct. R. 37, *amici curiae* state that this brief has not been authored in whole or in part by counsel for a party in this case, and no entity other than *amici* or their counsel made a monetary contribution to the preparation or submission of this brief. Letters of consent to the filing of this brief have been lodged with the Clerk.

[2] Each of these former diplomats filed an *amicus* brief in *Atkins v. Virginia*, 536 U.S. 304 (2002) (finding execution of persons with mental retardation violates Eighth Amendment).

arguments presented by Respondent Simmons and other *amici* supporting Respondent) should lead this Court to conclude that the practice of executing juveniles offends our evolving standards of decency, is both cruel and unusual, and hence, violates the Eighth and Fourteenth Amendments of the United States Constitution. U.S. Const. amends. VIII, XIV.

Amici curiae include the following:[3]

Morton Abramowitz is a Senior Fellow at The Century Foundation. A Career Ambassador, he served as U.S. Ambassador to Turkey, Assistant Secretary of State for Intelligence and Research, U.S. Ambassador to the Mutual and Balanced Force Reduction Negotiations in Vienna, U.S. Ambassador to Thailand, and Deputy Assistant Secretary of Defense for Inter-American, East Asian and Pacific Affairs. He has also served as President of the Carnegie Endowment For International Peace and as Acting President of the International Crisis Group.

Stephen W. Bosworth is Dean of the Fletcher School of Law and Diplomacy at Tufts University. During his diplomatic career, he served as U.S. Ambassador to the Republic of Korea, U.S. Ambassador to the Philippines, U.S. Ambassador to Tunisia, Director of the State Department Policy Planning Staff, Principal Deputy Assistant Secretary for Inter-American Affairs, and Deputy Assistant Secretary for Economic Affairs. He has also served as Executive Director of the Korean Peninsula Energy Development Organization (KEDO) and President of the United States-Japan Foundation.

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[3] The current affiliations of *amici* are provided here for identification purposes only, and are not intended to convey the views of their affiliated institutions on the questions at issue here.

Stuart E. Eizenstat is a partner at the Washington, D.C. law firm of Covington and Burling. During his career in public service, he served as Deputy Secretary of the Treasury, Undersecretary of State for Economic, Business and Agricultural Affairs, Undersecretary of Commerce for International Trade, U.S. Ambassador to the European Union, Special Representative of the President and the Secretary of State on Holocaust Era Issues, Chief Domestic Policy Adviser to the President and Executive Director of the White House Domestic Policy Staff.

John C. Kornblum is Chairman of Lazard & Co. GmbH in Germany. During his diplomatic career, he served as U.S. Ambassador to the Federal Republic of Germany, Assistant Secretary of State for European and Canadian Affairs, Senior Deputy Assistant Secretary of State for European and Canadian Affairs, U.S. Ambassador to the Conference of Security and Cooperation in Europe, Special Envoy to the Balkans, and U.S. Deputy Permanent Representative to the North Atlantic Treaty Organization in Brussels.

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Thomas R. Pickering is a former Under Secretary of State for Political Affairs. A Career Ambassador, during his diplomatic career, he also served as Assistant Secretary of State for Oceans, Environment and Science, U.S. Ambassador and Permanent Representative to the United Nations in New York, U.S. Ambassador to The Russian Federation, U.S. Ambassador to India, U.S. Ambassador to

Israel, U.S. Ambassador to El Salvador, U.S. Ambassador to Nigeria, U.S. Ambassador to The Hashemite Kingdom of Jordan, and Executive Secretary of the Department and Special Assistant to the Secretary. He was also President of the Eurasia Foundation.

Felix G. Rohatyn is the President of Rohatyn Associates. He was previously Counselor at the Council on Foreign Relations. He is a Trustee of the Center for Strategic and International Studies. He served from 1997 to 2000 as U.S. Ambassador to France, and before that, he was Partner and Managing Director of Lazard Freres, Chairman of the Municipal Assistance Corporation, and Member of the Board of Governors of the New York Stock Exchange.

J. Stapleton Roy is Managing Director of Kissinger Associates, Inc. A Career Ambassador, he served as U.S. Ambassador to Indonesia, U.S. Ambassador to the Peoples' Republic of China, and U.S. Ambassador to Singapore. He also served as Assistant Secretary of State for Intelligence and Research, Executive Secretary of the Department and Special Assistant to the Secretary, and as Deputy Assistant Secretary for East Asian and Pacific Affairs.

Frank G. Wisner is Vice-Chairman of the American International Group. A Career Ambassador, he served as U.S. Ambassador to India, U.S. Ambassador to the Philippines, U.S. Ambassador to Egypt, and U.S. Ambassador to Zambia. He also served as Under Secretary of Defense for Policy, Under Secretary of State for International Security Affairs, and Senior Deputy Assistant Secretary of State for African Affairs.

INTRODUCTION AND SUMMARY OF ARGUMENT

The United States is the leading executioner of juvenile offenders in the world. Between 1990 and 2003, states within the United States executed more juvenile offenders than *the rest of the world combined*. Of all the established democracies in the world, only the United States is known to execute individuals who were younger than eighteen when their crimes were committed.[4] Even nations that the United States consistently condemns for severe violations of human rights are virtually unanimous in their rejection of the execution of juvenile offenders. In good measure, this is because only two countries — the United States and Somalia — have not joined the rest of the world in ratifying the Convention on the Rights of the Child, which prohibits the execution of juvenile offenders.

In practice, only eight countries in the world are alleged to have executed juvenile offenders between 1990 and 2003, and over the past four years, that number has fallen to five: the Democratic Republic of Congo, China, Iran, Pakistan, and the United States. In no other area of human rights does the United States consider these nations to be our equals. Yet each of these other countries has recently abolished the death penalty for juveniles or has taken steps towards eliminating this practice. In light of the nearly universal condemnation of the execution of minors, continuation of this practice by the United States guarantees daily and growing criticism from the international community and our closest allies.

As former diplomats, *amici* make three submissions, based upon their first-hand observation and extensive

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[4] *Amici* will refer to individuals who were under the age of eighteen at the time of their offenses as "juvenile offenders."

experience in foreign affairs.[5] First, the current U.S. practice of executing juvenile offenders is manifestly inconsistent with global standards of decency that have been embraced by nearly every nation in the world. Second, permitting Missouri to execute Respondent Simmons will strain diplomatic relations with close U.S. allies, provide diplomatic ammunition to countries with demonstrably worse human rights records, increase our diplomatic isolation at a critical time, and impair important U.S. foreign policy interests. Third, in *Atkins v. Virginia*, 536 U.S. 304 (2002), this Court held that execution of persons with mental retardation offends civilized standards of decency, in part because "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved." *Atkins*, 536 U.S. at 316 n.21. To sustain the similarly disapproved practice of executing juvenile offenders would not only deny the "decent respect to the opinions of mankind" required by our Founding Fathers, but would also offend widely accepted "concepts of dignity, civilized standards, humanity and decency" that lie at the core of the Eighth and Fourteenth Amendments' prohibition against cruel and unusual punishments. *Estelle v. Gamble*, 429 U.S. 97, 102 (1976). Common sense demands that a punishment now so universally rejected be banned as both cruel and unusual under the Eighth Amendment.

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[5] This Court has long held that international law standards "may be ascertained by consulting the . . . general usage and practice of nations," *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 160-61(1820), and by examining "as evidence of these . . . the works of . . . *commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat.*" *The Paquete Habana*, 175 U.S. 677, 700 (1900) (emphasis added).

ARGUMENT

I. THE EXECUTION OF JUVENILE OFFENDERS OFFENDS MINIMUM STANDARDS OF DECENCY THAT HAVE BEEN EMBRACED BY NEARLY EVERY NATION IN THE WORLD.

The execution of juvenile offenders is manifestly inconsistent with minimum international standards of decency. When the rest of the member nations of the United Nations ratified the Convention on the Rights of the Child, they committed themselves to banning executions of child offenders. Only two nations — the United States and Somalia (which has long lacked an organized government) — have declined to ratify this convention.[6] It thus became inevitable that the United States would soon stand virtually alone in executing juvenile offenders.

Given the near unanimity of law and practice against executing juvenile offenders worldwide, *amici* believe that the current practice by a few states in the United States violates customary international law, which "is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination." *The Paquete Habana*, 175 U.S. 677, 700 (1900); *see also Sosa v. Alvarez Machain*, 124 S. Ct. 2739, 2764 (2004) (declaring that "[f]or two centuries we have affirmed that the domestic law of the United States recognizes the law of nations").

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[6] More than a decade ago, the United States signed this convention, indicating its intent to ratify. *See* Office of the United Nations High Commissioner for Human Rights, *Status of Ratifications of the Principal International Human Rights Treaties*, *available at* http://www.unhchr.ch/pdf/report.pdf (June 9, 2004).

A. International and Regional Bodies Have Condemned the Execution of Child Offenders by States in the United States.

Numerous international and regional bodies have passed resolutions, statements, and judgments expressing strenuous opposition to capital punishment for child offenders. As far back as 1984, the United Nations Economic and Social Council (ECOSOC) passed by consensus a resolution stating that "[p]ersons below 18 years of age at the time of the commission of the crime shall not be sentenced to death."[7]

Beginning in 1997, the U.N. Commission on Human Rights annually has adopted a resolution urging those states that retain capital punishment "[n]ot to impose it for crimes committed by persons below 18 years of age."[8] The U.N. High Commissioner for Human Rights, citing the "overwhelming international consensus that the death penalty should not apply to juvenile offenders," has also expressed

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[7] United Nations Economic and Social Council, *Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty*, E.S.C. Res. 1984/50, U.N. ESCOR, para. 3, U.N.Doc. E/RES/1984/50 (1984).

[8] *See The Question of the Death Penalty*, U.N. CHR, 59th Sess., para. 4, U.N. Doc. E/CN.4/RES/2003/67 (2003); *The Question of the Death Penalty*, U.N. CHR, 58th Sess., para. 4, U.N. Doc. E/CN.4/RES/2002/77 (2002); *The Question of the Death Penalty*, U.N. CHR, 57th Sess., para. 4, U.N. Doc. E/CN.4/RES/2001/68 (2001); *The Question of the Death Penalty*, U.N. CHR, 56th Sess., para. 3, U.N. Doc. E/CN.4/RES/2000/65 (2000); *Question of the Death Penalty*, U.N. CHR, 55th Sess., para. 3, U.N. Doc. E/CN.4/RES/1999/61 (1999); *Question of the Death Penalty*, U.N. CHR 54th Sess., para. 3, U.N. Doc. E/CN.4/RES/1998/8 (1998); *Question of the Death Penalty*, U.N. CHR 53rd Sess., para. 2, U.N. Doc. E/CN.4/RES/1997/12 (1997).

serious concern about executions of juvenile offenders in the United States.[9]

The U.N. Sub-Commission on the Promotion and Protection of Human Rights has similarly condemned the execution of juvenile offenders and has called upon all states to eliminate this practice.[10] The Sub-Commission has declared that "the imposition of the death penalty on those aged under 18 at the time of the commission of the offence is contrary to customary international law."[11]

The U.N. Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions has also repeatedly criticized the United States for the practice of executing juvenile offenders,[12] and has called for the elimination of this

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[9] *High Commissioner for Human Rights Expresses Concerns About Scheduled Execution of Two Juvenile Offenders in United States*, U.N. Press Release, June 23, 2000, *at* http://www.unhchr.ch/huricane/huricane.nsf/0/58DC70E87 E8C9997C1256907004AB060?opendocument (last consulted July 15, 2004).

[10] United Nations Sub-Commission on the Promotion and Protection of Human Rights, *The Death Penalty, Particularly in Relation to Juvenile Offenders*, 52d Sess., Res. 1999/4, para. 1, U.N. Doc. E/CN.4/Sub.2/RES/1999/4 (1999).

[11] United Nations Sub-Commission on the Promotion and Protection of Human Rights, *The Death Penalty, Particularly in Relation to Juvenile Offenders*, 53d Sess., Res. 2000/17, U.N. Doc. E/CN.4/Sub.2/RES/2000/17 (2000).

[12] *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, U.N. CHR, 60th Sess., para. 96, U.N. Doc. E/CN.4/2004/7 (2004); *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, U.N. CHR, 58th Sess., paras. 83, 102, 104, 149, U.N. Doc. E/CN.4/2002/74 (2002); *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, U.N. CHR, 57th Sess., paras. 65, 78, 119, U.N. Doc. E/CN.4/2001/9 (2001); *Report of the Special Rapporteur on*

practice.[13] Between 1992 and 2003, the Special Rapporteur sent twenty urgent appeals on behalf of fifteen individuals scheduled to be executed for crimes committed before the age of 18, including Respondent Simmons.[14] Despite these urgent appeals, ten of these juvenile offenders have been executed by individual states.[15]

The United Nations Human Rights Committee (HRC), the U.N. body charged with monitoring states' compliance with the International Covenant on Civil and Political Rights (ICCPR), has also "deplored" the U.S. practice of executing child offenders as contrary to customary international law. Article 6(5) of the ICCPR expressly prohibits the execution of juvenile offenders, but the United States entered a reservation to that provision, asserting that it retains the prerogative to impose the death sentence on juvenile offenders. The HRC has declared that "provisions in the [ICCPR] that represent customary international law (and a fortiori when they have the character of peremptory norms) may not be the subject of reservations. *Accordingly, a State*

Extrajudicial, Summary or Arbitrary Executions, U.N. CHR, 56th Sess., paras. 68, 97, U.N. Doc. E/CN.4/2000/3 (2000); *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, U.N. CHR, 55th Sess., paras. 36, 82, U.N. Doc. E/CN.4/1999/39 (1999); *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, U.N. CHR, 54th Sess., paras. 91, 92, U.N. Doc. E/CN.4/1998/68 (1997); *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, U.N. CHR, 53rd Sess., paras. 90, 116, U.N. Doc. E/CN.4/1997/60 (1996); *Note by the Secretary General, Annexed with a Report of the Special Rapporteur of the Commission on Human Rights on Extrajudicial, Summary or Arbitrary Executions*, U.N. GAOR, 51st Sess., paras. 50, 85, 115, 143, U.N. Doc. A/51/457 (1996); *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, U.N. CHR, 51st Sess., paras. 325, 327, 373, 380, U.N. Doc. E/CN.4/1995/61 (1994); *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, paras. 620, 624, 630, 685, 687, U.N. Doc. E/CN.4/1994/7 (1993); *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, U.N. CHR, 49th Sess., paras. 50, 52, 625, 679, U.N. Doc. E/CN.4/1993/46 (1992).

[13] *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions on a Mission to the United States of America*, U.N. ESCOR, 54th Sess., paras. 49, 145, 156(b), U.N. Doc. E/CN.4/1998/68/Add.3 (1998).

[14] *See Report of the Special Rapporteur on Extrajudicial, Summary, or Arbitrary Execution*, U.N. CHR, 59th Sess., paras. 511, 513, 514, 519, 521, 522, U.N. Doc. E/CN.4/2003/3/Add.1 (2003) (Napoleon Beazley, T.J. Jones, Steven Pannebaker, Toronto Patterson, Christopher Simmons, Alexander Edmund Williams); *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, U.N. CHR, 58th Sess., paras. 83, 102-104, U.N. Doc. E/CN.4/2002/74 (2002) (Napoleon Beazley, Gerald Lee Mitchell, Antonio Richardson); *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, U.N. CHR, 57th Sess., para. 79, U.N. Doc. E/CN.4/2001/9 (2001) (Shaka Sankofa (Gary Graham), Alexander Edmund Williams); *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, U.N. CHR, 56th Sess., para. 68, U.N. Doc. E/CN.4/2000/3 (2000) (Sean Sellers); *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, U.N. CHR, 55th Sess., para. 255, U.N. Doc. E/CN.4/1999/39/Add.1 (1999) (Napoleon Beazley, Joseph John Cannon); *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, U.N. CHR, 52nd Sess., para. 85, U.N. Doc. A/51/457 (1996) (Johnny Frank Garrett); *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, U.N. CHR, 51st Sess., para. 327, U.N. Doc. E/CN.4/1995/61 (1994) (Christopher Burger); *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, U.N. CHR, 50th Sess., para. 620, U.N. Doc. E/CN.4/1994/7 (1993) (Ruben Cantu, Gary Graham (Shaka Sankofa), Frederick Lashley); *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, U.N. CHR, 49th Sess., para. 635, U.N. Doc. E/CN.4/1993/46 (1992) (Johnny Frank Garrett).

[15] *See* Victor Streib, *The Juvenile Death Penalty Today: Death Sentences and Executions for Juvenile Crimes, January 1, 1973-April 30, 2004*, at 4 (May 4, 2004), *at* http://www.law.onu.edu/faculty/streib/JuvDeathApr302004.pdf (last visited July 16, 2004).

may not reserve the right . . . to execute . . . children."[16] In direct response to the United States' initial report on domestic compliance with the ICCPR, the HRC again found the U.S. reservation to Article 6(5) incompatible with the object and purpose of the Covenant and officially recommended that the United States withdraw its reservation.[17]

Regional bodies have likewise condemned the execution of juvenile offenders. The Council of Europe and the European Union, whose members include our closest allies, have expressed vehement opposition to the death penalty, particularly as applied to juveniles. The European Union has explained that "[a]ll the EU Member States reject the idea of incorrigibility of juveniles"[18] and has described the prohibition of the execution of juvenile offenders as a "minimum standard[]" with which its members must comply.[19] As a result, Central and Eastern European

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[16] Human Rights Committee, General Comment No. 24 (52), U.N. Doc. A/50/40, Vol. I (1995), Annex V, 119-125 (emphasis added).

[17] Human Rights Committee, U.N. Doc A/50/40, paras. 279, 292, originally issued as U.N. Doc. CCPR/C/79/Add.50 (1995).

[18] European Union , *European Union in the U.S.: EU Memorandum on the Death Penalty*, *at* http://www.eurunion.org/legislat/DeathPenalty/eumemorandum.htm (last consulted June 14, 2004); *see also id.* (stating that "[t]he EU is equally concerned about the imposition of the death penalty on persons below 18 years of age").

[19] *See, e.g., Id.*; European Union, *European Union in the U.S.: Guidelines to EU Policy Towards Third Countries on the Death Penalty*, June 3, 1998 (detailing situations in which the EU will issue demarches, such as when it "becomes aware of individual death penalty cases which violate minimum standards. . . . Where states insist on maintaining the death penalty, the EU considers it important that the following minimum standards should be met. . . . Capital punishment may not be imposed on . . . [p]ersons below 18 years of age at the time of the commission of

countries that aspire to enter the European system must abolish the death penalty for juvenile offenders as a precondition for membership in the European political and economic community.[20]

The Inter-American Commission on Human Rights, one of the principal bodies of the Organization of American States (OAS), has also repeatedly criticized the United States for its practice of executing juvenile offenders, finding that such executions violate core fundamental human rights. In 2002, the Inter-American Commission declared that "a norm of international customary law has emerged prohibiting the execution of offenders under the age of 18 years at the time of their crime" and that "this rule has been recognized as being of a sufficiently indelible nature to now constitute a norm of jus cogens." *Michael Domingues v. United States*, Case 12.285, Report No. 62/02, paras. 84-85, 22 Oct. 2002.[21]

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their crime"), *at* http://www.eurunion.org/legislat/DeathPenalty/Guidelines.htm (last consulted June 14, 2004); *see also* Bruce Shapiro, *Dead Reckoning*, The Nation (July 26, 2001) (quoting Walter Schwimmer, Secretary General of the Council of Europe, who declared that the American death penalty is "'our greatest concern'") *available at* http://www.thenation.com/doc.mhtml%3Fi=20010806&s =Shapiro.

[20] *See* European Union, *The EU's Human Rights & Democratisation Policy: Abolition of the Death Penalty*, *at* http://europa.eu.int/comm/external_relations/human_rights/adp/ (last consulted July 15, 2004); *The Abolition of Capital Punishment*, Res. 1044, Eur. Parl. Ass., 25th Sitting (Oct. 4, 1994), *available at* http://assembly.coe.int/Documents/AdoptedText/TA94/ERES1044.htm.

[21] A *jus cogens* norm is a norm "recognized by the international community of states as peremptory, permitting no derogation." Restatement (Third) of Foreign Relations Law of the United States § 102, cmt. k (1987); *see also id.* at note 6 (indicating adoption of definition of *jus cogens* from Article 53 of the Vienna Convention on the Law of Treaties).

The Commission concluded that "the U.S. stands alone amongst the traditional developed world nations and those of the inter-American system, and has also become increasingly isolated within the entire global community." *Id.*, para. 84. The Commission urged the United States to commute Domingues' sentence and "to ensure that capital punishment is not imposed upon persons who, at the time their crime was committed, were under 18 years of age." *Id.*, para. 113.2. The Commission reiterated its position on the peremptory nature of the prohibition against the execution of juvenile offenders in the case of Napoleon Beazley, a juvenile offender executed by the state of Texas in 2003. *See Napoleon Beazley v. United States*, Case 12.412, Report No. 101/03, paras. 47-50, 29 Dec. 2003.

B. The Nations of the World, Including Both Our Close Allies and Countries with Poor Human Rights Records, are Virtually Unanimous in Their Rejection of Executing Juvenile Offenders in Law and in Practice.

The consistent and growing practice of other nations underscores the cruel and unusual nature of executing juvenile offenders. The execution of juvenile offenders accounts for only a tiny fraction of known executions worldwide, making it a truly unusual punishment.[22] As of

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[22] In 2000, executions of juvenile offenders constituted less than one-half of one percent (6 out of 1457) of executions recorded worldwide. Amnesty International, *Children and the Death Penalty: Executions Worldwide Since 1990*, ACT 50/007/2002, *at* http://web.amnesty.org/library/Index/ENGACT500072002?open&of=ENG-392 (Sept. 2002) [hereinafter *Children and the Death Penalty*]. Four of these six executions took place in the United States. *Id.* In 2002, executions of juvenile offenders dropped to less than two-tenths of one percent (3 of 1526) of executions in the world; all three took place in the United States. Amnesty International, *Facts and Figures on the Death Penalty*, ACT 50/005/2003, *at* http://web.amnesty.org/library/ Index/

2003, more than half of all nations in the world had abolished the death penalty, in law or in practice.[23] One nongovernmental organization reports that of the 118 nations whose laws still provide for the death penalty for at least some offenses, 113 either have provisions in their laws that expressly prohibit the execution of child offenders or may be presumed to exclude such executions by being party to an international convention prohibiting the death penalty, without having entered a reservation to the relevant articles of these treaties.[24] Thus, nations throughout the world, regardless of their political ideologies, social mores, or religious traditions, have bound themselves to reject the practice of executing juvenile offenders.

Since this Court last gave plenary consideration to the constitutionality of the juvenile death penalty, the number of nations that allow for the imposition of the death penalty against juvenile offenders has significantly decreased. Over the last decade, at least thirty-five countries from all parts of

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ENGACT500052003? open&of=ENG-392 (Apr. 11 2003) [hereinafter *Facts and Figures 2003*].

[23] *See Status of the International Covenants on Human Rights, Question of the Death Penalty*, U.N. CHR, 59th Sess., para. 31, U.N. Doc., E/CN.4/2003/106 (2003); Amnesty International, *The Death Penalty Worldwide: Developments in 2003*, ACT 50/007/2004, *at* http://web.amnesty.org/library/Index/ ENGACT500072004?open&of=ENG-392 (Apr. 6, 2004) [hereinafter *Death Penalty Worldwide*].

[24] *Children and the Death Penalty*, *supra* note 22; *see also Facts and Figures on the Death Penalty*, ACT 50/008/2004, *at* http://web.amnesty.org/library/Index/ ENGACT500082004?open&of=ENG-392 (Apr. 6, 2004) [hereinafter *Facts and Figures 2004*]. Relevant conventions include the International Covenant on Civil and Political Rights, the Convention on the Rights of the Child, the African Charter on the Rights and Welfare of the Child, and the American Convention on Human Rights.

the world have either abolished the death penalty for all offenders or specifically for juvenile offenders.[25] Only a small handful of countries, each of which has been consistently criticized by the United States for severe human rights abuses, actually executes juvenile offenders, and the number of such countries has fallen over the last thirteen years. Since 1990, only eight nations are reported to have put juvenile offenders to death: China, the Democratic Republic of Congo (DRC), Iran, Nigeria, Pakistan, Saudi Arabia, Yemen, and the United States.[26] Between 2000 and 2002, only four of these countries executed minors. And in 2003, only two countries — China and the United States — were known to have executed juvenile offenders.[27]

Significantly, even those few nations that have recently executed juveniles are now repudiating the practice. China, Pakistan, and Yemen have each enacted laws to raise the minimum age for eligibility for the death penalty to eighteen,[28] and Iran is currently in the process of doing so.[29] The Democratic Republic of Congo, after urgent appeals by the international community, recently commuted the death sentences imposed upon four juvenile offenders[30] and has since abolished the military courts that ordered its only execution of a child offender since 1990.[31]

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[25] These include countries from Africa (Angola, Côte d'Ivoire, Mauritius, Mozambique, South Africa), the Americas (Canada, Paraguay), Asia and the Pacific (Hong Kong, Nepal, Samoa, Timor-Leste) and Europe (Armenia, Azerbaijan, Bosnia-Herzegovina, Bulgaria, Cyprus, Estonia, Georgia, Lithuania, Poland, Serbia and Montenegro, Turkmenistan, and Ukraine). *Facts and Figures 2004, supra* note 24; *see also* U.N. Commission on Crime Prevention and Criminal Justice, *Capital Punishment and Implementation of the Safeguards Guaranteeing Protection of the Rights of those Facing the Death Penalty: Report of the Secretary-General*, U.N. Doc. E/CN.15/2001/10, para. 99 (2001) (noting abolition of death penalty for juveniles in Barbados and Zimbabwe). China, Pakistan and Yemen have also recently revised their criminal laws to eliminate the practice of imposing death sentences on juvenile offenders. *Death Penalty Worldwide*, *supra* note 23.

[26] The number of reported executions in each of these countries from 1990 to the present is as follows: China (1), Democratic Republic of Congo (1), Iran (8), Nigeria (1), Pakistan (3), Saudi Arabia (1), Yemen (1), and the United States (19). *Death Penalty Worldwide*, *supra note 23*. Child offenders are also currently known to be under sentence of death in two other nations: the Philippines and Sudan. *Id.* Both Nigeria and Saudi Arabia have emphatically denied that the executions reported to have taken place in those countries in 1997 and 1992, respectively, were of juvenile offenders. *See* United Nations Sub-Commission on the Promotion and Protection of Human Rights, *Summary Record of 6th Meeting*, 52nd Sess., U.N. Doc. E/CN.4/Sub.2/2000/SR.6 para. 39 (2000) (documenting Nigeria's denial that it executes juveniles); American Bar Association, *Juvenile Death Penalty: Scott Hain* (documenting Saudi-Arabia's denial of a 1992 execution of a juvenile), *at* http://www.abanet.org/crimjust/juvjus/hain.html.

[27] *Death Penalty Worldwide*, *supra* note 23.

[28] *Facts and Figures 2004*, *supra* note 24.

[29] In December 2003, the Iranian parliament approved a bill that would raise the legal minimum age for death eligibility to eighteen. This bill currently awaits approval by the Guardian Council, Iran's highest legislative body. Amnesty International, *Execution of Child Offenders: Updated Facts and Figures*, POL 3-/007/2004 (Feb. 16, 2004), *at* http://web.amnesty.org/library/index/ engpol300072004 [hereinafter *Execution of Child Offenders*].

[30] *See* The International Justice Project, *Reported Worldwide Executions of Juveniles Since 1990*, *at* http://www.internationaljusticeproject.org/juvWorld.cfm?print=yes (last visited June 14, 2004).

[31] *Situation of Human Rights in the Democratic Republic of* Congo, U.N. CHR, 59th Sess., para. 5, U.N. Doc. E/CN.4/RES/2003/15 (2003) (discussing Congo's decisions to abolish the Military Court and to commute the death sentences imposed on juvenile offenders by the Military Court), *available at* http://www.unhchr.ch/Huridocda/Huridoca.nsf/(Symbol)/E.CN.4.RES.2003.15.En?Opendocument; *see also Executions of Child Offenders*, *supra* note 29.

If these trends continue, the United States will soon stand alone as the only country in the world that endorses the regular execution of juvenile offenders as part of its ordinary criminal justice system.[32] By law and practice, members of the international community have pronounced with near unanimity their condemnation of the execution of juvenile offenders. Countries with far worse human rights records than the United States have recognized the cruel and unusual nature of executing juvenile offenders.

Even among the small group of nations that are reported to have executed juvenile offenders over the past fourteen years, the United States stands out, putting to death more juvenile offenders between 1990 and 2003 than all other nations in the world combined. Between 1990 and 2003, China, Nigeria, and the Democratic Republic of Congo are each reported to have executed only a single juvenile offender, in contrast to the United States' execution of *nineteen* juvenile offenders during the same period.[33] Between 2000 and 2003, the United States accounted for nearly two-thirds (nine out of fifteen) of the juvenile offenders executed in the world.[34]

Significantly, the unchanging practice of a very few states drives the global perception that the United States widely endorses this aberrant practice. Yet only a few states actually put juveniles to death, and the number of states that allow for this practice is falling. Before this Court's 1972

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[32] Human Rights Watch, *U.S.: The Death Penalty and Juvenile Offenders*, *at* http://www.hrw.org/campaigns/deathpenalty/ docs/ update1023.htm (last visited June 14, 2004).

[33] *Execution of Child Offenders*, *supra* note 29.

[34] *Id.*

decision in *Furman v. Georgia*, 408 U.S. 238 (1972), 38 states and the federal government had executed juvenile offenders.[35] Today, that number has been halved to only 19 states,[36] and neither the federal government nor the District of Columbia authorizes death as a punishment for anyone under 18. In practice, the imposition of the death penalty upon children has become even more limited. Only three states — Texas, Virginia, and Oklahoma — account for 81 percent of the 22 executions of children in the United States since 1972.[37] No other state has executed a child in the last decade. There is no comparable area of our foreign policy — whether state taxation, immigration control, or trade

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[35] *See* Streib, *supra* note 15, at 4 (May 4, 2004), *at* http://www.law.onu.edu/faculty/streib/JuvDeathApr302004.pdf (last visited June 14, 2004).

[36] *Id.* at 7 (reporting status of state laws as of June 30, 2003). South Dakota and Wyoming abolished the juvenile death penalty in March 2004. International condemnation of the execution of juvenile offenders has played a significant role in moving some state legislatures to abolish the juvenile death penalty. For example, in South Dakota, the primary sponsor of the bill (SB 182) to eliminate this practice declared that "internationally, the execution of juveniles is largely considered inhumane, anachronistic, and in direct conflict with the fundamental principles of justice. . . ." An Act to Prohibit Capital Punishment of Juvenile Offenders, SB 182, S. Dak. 2004 Sess., (Feb. 6, 2004) (statement of Sen. Patricia de Hueck); *audio available at* http://legis.state.sd.us/ sessions/2004/index.cfm?FuseAction=DisplayBills; *see also id.* (Feb. 24, 2004) (statement of Rep. Ben Nesselhuf) ("I propose that we pass [the bill abolishing the juvenile death penalty] today and let the world know that South Dakota cares more about human rights than the Democratic Republic of Congo. . . . and let the world know that South Dakota is as progressive as Iran . . . . [W]e are recognizing what the rest of the world already knows.")

[37] Streib, *supra* note 15, at 5. The only other states which have carried out such an execution since 1972 are Georgia, Missouri, Louisiana, and South Carolina; each has carried out one execution. *Id.* at 4.

regulation — in which we permit the practices of so few states to render our entire nation such a global pariah.

II. THE STRONG INTERNATIONAL CONSENSUS AGAINST THE EXECUTION OF JUVENILE OFFENDERS HAS INCREASINGLY ISOLATED THE UNITED STATES DIPLOMATICALLY.

By continuing to embrace the globally condemned practice of executing juvenile offenders, a few individual states risk undermining critical foreign policy interests of the entire nation. In *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 385 (2000), this Court found that "statements of foreign powers necessarily involved in the President's [foreign policy] efforts, . . . indications of concrete disputes with those powers, and opinions of senior National Government officials are competent and direct evidence of the frustration" of national foreign policy interests by the laws of individual states. Based on their extensive personal experience, *amici* submit that the sustained opposition to the execution of juvenile offenders in the United States constitutes relevant evidence that maintaining Missouri's law and practice of executing juvenile offenders would frustrate our broader national foreign policy goals.

Amici believe that allowing Missouri to execute Christopher Simmons will diplomatically isolate the United States and hinder its foreign policy goals by alienating countries that have been American allies of long standing. These allies, with strong rule-of-law traditions and political histories, social values, and legal systems similar to ours, have led a worldwide protest against the practice of executing juvenile offenders in the United States. At this critical time in our foreign policy, when our closest allies are needed the most, the insistence of a few states on continuing to execute juvenile offenders should not be permitted to isolate the entire nation.

Numerous international and regional organizations have consistently opposed the execution of juvenile offenders in the United States through repeated diplomatic demarches, letters, and press releases.[38] The European Union has expressed its disapproval of the execution of juvenile offenders in the United States through demarches addressing numerous juvenile executions, including the pending execution of Respondent Simmons.[39] The Secretary General

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[38] *See, e.g.*, American Bar Association, *Juvenile Offender Napoleon Beazley Facing Execution in Texas* (reporting that "the United Nations High Commission[er] for Human Rights, the European Union, the Council of Europe and the Vatican have expressed their strongest opposition to the execution of juvenile offenders."), *at* http://www.abanet.org/crimjust/juvjus/beazley.html (last consulted June 14, 2004); *see also* Letter from Mary Robinson, UN High Commissioner for Human Rights, to the Press Conference organized by the Death Penalty Information Center (Oct. 12, 1999), *at* http://www.deathpenaltyinfo.org/article.php?scid=18&did=226#robinson; Letter from the Ambassador of Spain, Ambassador of Denmark, and the Delegation of the European Commission, to the Texas Board of Pardons and Paroles (May 7, 2002), *at* http://www.eurunion.org/legislat/DeathPenalty/BeazleyBdPardPar0507.htm; Council of Europe, Res. 1253 (June 25, 2001), *available at* http://assembly.coe.int/Documents/AdoptedText/ta01/ERES1253.htm.

[39] Demarches were transmitted in each of the following juvenile death penalty cases: Sean Sellers, Oklahoma, Feb. 11, 1999; Douglas Thomas, Virginia, June 21, 1999; Steve Roach, Virginia, Jan. 14, 2000; Glen McGinnis, Texas, Jan. 18, 2000; Gary Graham, Texas, May 17, 2000 & June 22, 2000; Antonio Richardson, Missouri, Feb. 21, 2001; Gerald Mitchell, Texas, Oct. 3, 2001; Napoleon Beazley, Texas, July 20, 2001, Aug. 10, 2001, Aug. 14, 2001 & May 7, 2002; Alexander Williams, Georgia, Feb. 14, 2002; Christopher Simmons, Missouri, Apr. 17, 2002; T.J. Jones, Texas, July 23, 2002; Toronto Patterson, Texas, July 29, 2002; Kevin Stanford, Kentucky, Oct. 7, 2002; Ronald Chris Foster, Mississippi, Dec. 16, 2002; Scott Hain, Oklahoma, Feb. 26, 2003. *See* European Union, *European Union in the U.S.: EU Policy and Action on the Death Penalty* (documenting demarches regarding juvenile offenders facing death penalty), *at* http://www.eurunion.org/legislat/DeathPenalty/deathpenhome.htm#ActionUSDeathRowCases.

of the Council of Europe has expressed his "deepest concern and abhorrence" about pending executions of juvenile offenders, and has called the execution of juvenile offenders "particularly distressing."[40] The Inter-American Commission on Human Rights has likewise condemned the United States three times for executing juvenile offenders.[41] Many of the foreign governments to which *amici* have been accredited as ambassadors have expressed sustained outrage at the continued use of the death penalty, especially as applied to juveniles.[42] U.S. embassies throughout the world have been

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[40] Letter from Walter Schwimmer, Secretary General, Council of Europe, to Rick Perry, Governor of Texas (July 15, 2002) ("I write to you to express my deepest concern and abhorrence about the imminent execution of T.J. Jones [a juvenile offender] . . . . The Council of Europe and its 44 member States are unequivocally opposed to the death penalty, considering that it has no place in a civilised democracy . . . . The case of T.J. Jones is particularly distressing, since it is reported that he was a minor at the time of the crime."), *at* http://www.abanet.org/crimjust/juvjus/tjcofe.html (last consulted June 14, 2004); Press Release by Council of Europe Secretary General, Walter Schwimmer (calling pending execution of juvenile offender Napoleon Beazley "particularly distressing"), *at* http://press.coe.int/cp/2001/555a(2001).htm.

[41] *See Annual Report of the Inter-American Commission on Human Rights 2003*, Report N° 101/03, Case 12.412, Napoleon Beazley, *available at* http://www.cidh.org/annualrep/2003eng/USA.12412.htm; *Annual Report of the Inter-American Commission on Human Rights 2003*, Report N° 97/03, Case 11.193, Gary T. Graham (now known as Shaka Sankofa), *available at* http://www.cidh.org/annualrep/2003eng/USA.11193.htm; *Annual Report of the Inter-American Commission on Human Rights 2002*, Report N° 62/02, Case 12.285, Michael Domingues, *available at* http://www.cidh.org/annualrep/2002eng/USA.12285.htm.

[42] When the United States ratified the International Convention on Civil and Political Rights in 1992 with a reservation asserting the prerogative to impose the death penalty against child offenders, eleven state parties to the convention formally objected to the U.S. reservation: Belgium, Denmark, Finland, France, Germany, Italy, the Netherlands, Norway, Portugal, Spain, and Sweden. *See* William Schabas, *The Abolition of the Death Penalty in International Law* 314-19 (1997); *Children and the Death Penalty*, *supra* note 22.

flooded with letters and petitions signed by millions of individuals, and diplomatic missions have been significantly disrupted by demonstrations against pending executions in the United States.[43]

Amici believe that persisting in this aberrant practice of executing juveniles will further the diplomatic isolation of the United States and inevitably harm foreign policy objectives. The United States is needlessly placed on the defensive in diplomatic missions. Instead of focusing on advancing U.S. interests, U.S. diplomats abroad are increasingly called into meetings to answer foreign criticisms of the death penalty.[44] *Amici* can personally

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[43] *See, e.g.*, Richard C. Dieter, Executive Director, Death Penalty Information Center, *International Perspectives on the Death Penalty: A Costly Isolation for the U.S.* (Oct. 1999) ("While Paula Cooper was on death row in Indiana for a murder committed at age 15, over a million signatures were gathered in Italy protesting the sentence, and the Pope also sought to intervene."), *at* http://www.deathpenaltyinfo.org/article.php?scid=45&did=536 (last consulted June 14, 2004); Felix G. Rohatyn, Op-Ed, *America's Deadly Image*, Wash. Post, Feb. 20, 2001, at A23 (stating that "[r]epeated protests in front of the embassy in Paris, protests at our consulates, and, just recently, a petition signed by 500,000 French men and women . . . were part of a constant refrain . . . . [T]he United States is seen as executing people who have not had appropriate legal assistance, people who may be innocent . . . as well as minors."); Marcus Mabry, *A Bad Case of Euro Envy: The Rift Between U.S. and Old World Values is Threatening America's Claim to Global Leadership*, Newsweek, Apr. 16, 2001, at 2 (reporting that "[h]uman-rights organizations and thousands of demonstrators bear down on U.S. embassies with each controversial execution in America.").

[44] *See A Covenant with Death*, Economist, May 12, 2001, at 34 ("Colin Powell, the secretary of state, is routinely confronted about his country's use of the death penalty when he meets his counterparts around the world."); *see also* U.S. Ambassador Stephan M. Minikes, *Right of Reply: Intervention on the Death Penalty, delivered to the Permanent Council of The Organization for Security and Cooperation in Europe (OSCE)*, July 25, 2002 (responding to formal interventions by EU and other delegations

attest to the degree to which important bilateral meetings with our closest allies are now consumed with responding to repeated official challenges to this practice. International organizations have gone so far as to threaten the United States with economic sanctions or loss of standing due to this aberrant practice of executing juvenile offenders.[45]

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to the OSCE regarding death sentences imposed on juvenile offenders Toronto Patterson and T.J. Jones), *at* http://www.usosce.rpo.at/archive/2002/07/25cappun.htm; Norwegian Ministry of Foreign Affairs, *Norway Asks USA to Pardon American on Death Row*, Press Release, Feb. 8, 2001 ("The American Embassy in Oslo was asked to meet early today at the Ministry of Foreign Affairs . . . . At the meeting it was emphasized that Norway supports the request by all the EU countries to the Governor of Texas and the Texas Board of Pardons and Paroles to commute the death sentence of [a juvenile offender]. At the same time Norway expressed its concern at the use of the death penalty in the USA. Applying the death penalty to persons who were minors at the time of the crime is particularly serious."), *at* http://odin.dep.no/odinarkiv/norsk/dep/ud/p10002480/eng/032001-070214/dok-bn.html (last consulted June 14, 2004); *Europe Outraged Over Graham Execution*, CBS News, June 23, 2000 (documenting opposition in Europe to execution of juvenile offender and quoting German lawmaker calling upon the German government to "'make this detestable topic the object of discussions with our American friends'"), *available at* http://www.cbsnews.com/stories/2000/06/21/ national/main207908.shtml (last consulted June 14, 2004).

[45] *See Council of Europe Appeals on Behalf of U.S. Inmate Sentenced as a Teen-Ager to Die*, Associated Press, Aug. 15, 2001 ("The Council of Europe is the guardian of the 1952 European Convention on Human Rights. In June, it threatened the United States . . . with the loss of [its] observer status unless [it] stopped practicing capital punishment. . . ."); Amnesty International, *United States of America – Too Young to Vote, Old Enough to be Executed: Texas Set to Kill Another Child Offender*, July 2001 (quoting the Chairman of the European Parliament Delegation for Relations with the United States: "[W]e are concerned that the almost universal repugnance felt in Europe and elsewhere for the continued application of the death penalty in certain American states may also have economic consequences. Europe is the foremost foreign investor in Texas. Many companies, under pressure from shareholders and public opinion to apply ethical business practices, are beginning to consider the possibility of restricting investment in the U.S. to states that do not apply

The persistence of this practice by only a few states has allowed allies and adversaries alike to challenge the United States' claim to moral authority in the domain of international human rights.[46] Such challenges deflect

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the death penalty."), *available at* http://web.amnesty.org/aidoc/aidoc_pdf.nsf/Index/AMR511052001ENGLISH/$File/AMR5110501.pdf (last consulted June 14, 2004).

[46] *See, e.g.*, *Europeans Deplore Executions in the U.S.*, N.Y. Times, Feb. 26, 2000, at A8 (quoting Henry LeClerc, the president of the Human Rights League in Paris: "'For us, what the Americans are doing is completely incomprehensible, that such an advanced country can be involved in such an act of barbarism . . . . No European country does this. No advanced country does this. America is doing it along with countries like China and Russia and other countries that have terrible human rights records.'"); *Europe Outraged Over Graham Execution*, CBS News, June 23, 2000 (quoting German lawmaker Sabine Leutheusser-Schnarrenberger: "'It does not fit: The United States presents itself on the one hand as the world police defending human rights, and on the other side it carries out the death penalty.'"), *available at* http://www.cbsnews.com/stories/2000/06/21/national/main207908.shtml (last consulted June 14, 2004); *French Lawmaker Denounces United States' Use of Death Penalty*, Associated Press Worldstream, June 10, 2000 (quoting Raymond Forni, president of France's National Assembly: "'The United States of America's prestigious image bears a tarnish . . . . It is no longer slavery, it is no longer racial segregation, it is the death penalty . . . . We must become America's guilty conscience and ensure that it finally ceases to be the black sheep of the western democracies.'"); American Bar Association, *Beazley Execution: Assembly President Calls for Clemency*, Aug. 10, 2001 (quoting Lord Russell-Johnston, President of the Parliamentary Assembly of the 43-nation Council of Europe: "'The execution of Napoleon Beazley is set for 15 August . . . . Over eighty others, who were aged only sixteen or seventeen at the time of their crime, are on death row. This is unjustifiable, inexcusable and barbaric. A country which is . . . killing people – including juveniles . . . cannot claim world leadership in justice and human rights. The United States' moral influence in international affairs is being eroded . . . .'"), *at* http://www.abanet.org/crimjust/juvjus/ beazleycouncil.html (last consulted June 14, 2004); Marcus Mabry, *A Bad Case of Euro Envy: The Rift Between U.S. and Old World Values is Threatening America's Claim to Global Leadership*, Newsweek, Apr. 16, 2001, at 2: "[Karsten] Voigt [coordinator for German-American relations at the Foreign Ministry in

attention away from serious human rights violations in other countries that have exhibited far worse human rights records. China, for example, has repeatedly responded to U.S. reports criticizing its severe human rights abuses by taking aim at our practice of permitting the execution of juvenile offenders.[47] *Amici* believe that this continuing state practice seriously disserves this nation's broader foreign policy objectives and undermines this nation's leadership role in the world.

III. INTERNATIONAL STANDARDS AND PRACTICES ARE RELEVANT TO DETERMINING EVOLVING STANDARDS OF DECENCY UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS.

The almost universal abandonment of capital punishment for juvenile offenders by other nations is relevant in determining whether the practice is accepted under the "evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101 (1958). While this Court has primarily discerned these standards by reference to the actions of state legislatures and juries, it has looked to international practices as well. Indeed, our earliest understandings of the Eighth Amendment reflected the

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Berlin] predicts that in coming years, disagreements over values will become intractable . . . . Increasingly, Europe will find it difficult (and unpopular) to be allied with a nation whose values it doesn't share – not to mention to be led by it.").

[47] *See, e.g.*, Information Office of the State Council of the People's Republic of China, *Human Rights Record of the United States in 2003* (Mar. 1, 2004) (responding to U.S. report on abuses in China by pointing to, among other things, execution of juvenile offenders in the United States), *available at* http://news.xinhuanet.com/english/2004-03/01/content_1338758.htm; *see also China Hits Back on Human Rights*, Reuters, Apr. 3, 2003 (citing U.S. practice of executing juveniles), *at* http://www.cnn.com/2003/WORLD/asiapcf/east/04/03/ china.rights.reut/.

opinions and practices of other civilized nations. The phrase "cruel and unusual" originated in the English Bill of Rights of 1689, and the Declaration of Independence gave "decent respect to the opinions of mankind." Declaration of Independence, para. 1 (U.S. 1776); *see also* Louis Henkin, *A Decent Respect to the Opinions of Mankind*, 25 J. Marshall L. Rev. 215 (1992). As Justice Blackmun noted, "[t]he drafters of the [Eighth] Amendment were concerned, at root, with the 'dignity of man,' and understood that 'evolving standards of decency' should be measured, in part, against international norms." Harry A. Blackmun, *The Supreme Court and the Law of Nations*, 104 Yale L. J. 39, 45-46 (1994).

In keeping with this original intent, this Court has looked to international and foreign practices on a number of occasions for guidance in interpreting the Eighth Amendment's prohibition against cruel and unusual punishments. Most recently, the Court, holding that execution of the mentally retarded violates the Eighth Amendment, observed that "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved." *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2003); *see also Thompson v. Oklahoma*, 487 U.S. 815, 830-31, n.31 (1988) (plurality opinion) ("We have previously recognized the relevance of the views of the international community in determining whether a punishment is cruel and unusual."). Other decisions regarding the Eighth Amendment have been informed by the practices of other nations. *See Trop*, 356 U.S. at 102-103 (relying on "virtual unanimity" of "civilized nations of the world" in finding the punishment of statelessness to be prohibited under the Eight Amendment); *Enmund v. Florida*, 458 U.S. 782, 796 n.22 (1982) (finding "international opinion concerning the acceptability of a particular punishment" relevant and, in rejecting imposition of death penalty for accomplice liability in felony murders, observing that "the doctrine of felony murder has been

abolished in England and India, severely restricted in Canada and a number of Commonwealth countries, and is unknown in continental Europe"); *Coker v. Georgia*, 433 U.S. 584, 596 n.10 (1977) (finding international practices regarding the death penalty for rape relevant to the "evolving standards" analysis).

International opinion has informed this Court's recent understandings of other constitutional doctrines as well. *See, e.g.*, *Lawrence v. Texas*, 539 U.S. 558, 576-77 (2003) (considering, in construing the constitutional concepts of privacy and due process, whether practices have "been accepted as an integral part of human freedom in many other countries" and have "been rejected elsewhere"); *Grutter v. Bollinger*, 539 U.S. 306, 342 (2003) (Ginsburg, J., concurring) (referencing the "international understanding" relating to affirmative action plans and citing United Nations conventions); *Raines v. Byrd*, 521 U.S. 811, 828 (1997) (arguing that an alternative system for establishing standing to sue would not be irrational, because it is followed by some European courts); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 381-82 (1995) (Scalia, J., dissenting) (arguing that the experiences of Australia, Canada, and England are relevant in setting rules for the distribution of anonymous campaign literature); *Washington v. Glucksberg*, 521 U.S. 702, 710 & n.8 (1997) (noting that "almost every western democracy" criminalized physician-assisted suicide and discussing laws in a number of nations in Western Europe).

Amici respectfully submit that abundant evidence supports the conclusion that members of the international community — ranging from liberal democracies to autocratic regimes — have reached nearly universal agreement that the continuing American practice of executing juveniles does not exhibit "decent respect to the opinions of mankind." To restore the United States to its leading position on human

rights, *amici* urge this Court to bring this country's practices with regard to execution of juvenile offenders into line with those of the rest of the world.

CONCLUSION

For the aforementioned reasons, *amici* respectfully request this Court to affirm the decision of the Missouri Supreme Court.

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No. 03-633

In the
Supreme Court of the United States

DONALD P. ROPER, Superintendent,
Potosi Correctional Center
Petitioner,

v.

CHRISTOPHER SIMMONS,
Respondent.

On Writ of Certiorari to the
Supreme Court of Missouri

BRIEF OF THE STATES OF ALABAMA, DELAWARE, OKLAHOMA, TEXAS, UTAH, AND VIRGINIA AS AMICI CURIAE IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Once this Court holds that a particular punishment is not "cruel and unusual" and thus barred by the Eighth and Fourteenth Amendments, can a lower court reach a contrary decision based on its own analysis of evolving standards?

2. Is the imposition of the death penalty on a person who commits a murder at age seventeen "cruel and unusual," and thus barred by the Eighth and Fourteenth Amendments?

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INTEREST OF AMICI CURIAE

Pursuant to Supreme Court Rule 37.4, the States of Alabama, Delaware, Oklahoma, Texas, Utah, and Virginia submit this brief as amici curiae in support of petitioner, Donald P. Roper, Superintendent, Potosi Correctional Center. At issue is the question whether the Eighth Amendment categorically prohibits the execution of murderers who were younger than 18 years old when they committed their crimes.

In accordance with this Court's decisions in *Thompson v. Oklahoma*, 487 U.S. 815 (1988), and *Stanford v. Kentucky*, 492 U.S. 361 (1989), the State of Alabama has established 16 as the age at which an individual should be held fully responsible for his crimes and subject, in appropriate circumstances, to capital punishment. The State of Alabama thus permits, as the constitutional rule advanced by respondent would not, the execution – again, in appropriate circumstances – of murderers who were 16 or 17 when they killed their victims. *See Ex parte Davis*, 554 So. 2d 1111, 1114 (Ala. 1989). Accordingly, the State of Alabama has a concrete interest in the outcome of this case. The other amici likewise authorize capital punishment in appropriate circumstances for offenders under the age of 18, and thus also have a direct interest in the disposition of this case.

SUMMARY OF ARGUMENT

Amici's experience strongly indicates that a bright-line rule categorically exempting 16- and 17-year-olds from the death penalty – no matter how elaborate the plot, how sinister the killing, or how sophisticated the cover-up – would be arbitrary at best, and downright perverse at worst. Using abbreviated descriptions of a handful of murders committed by "juvenile" offenders currently on Alabama's death-row, this brief will show that, despite their chronological age, *at least some* 16- and 17-year-old killers most assuredly are able to distinguish

right from wrong and to appreciate fully the consequences of their murderous actions. Because a prophylactic constitutional rule taking capital punishment off the table for *all* such offenders would have no footing in the real world, it should be rejected.

Although this brief uses examples drawn from Alabama to make its point, the other amici hasten to note that their experiences have been no different. There simply is no basis to conclude that 16- and 17-year-olds are categorically incapable of committing heinous (and meticulously planned) murders, and there is no justification for categorically exempting them from the death penalty.[1]

ARGUMENT

Once again, this Court is asked to "'draw a line' that would prohibit the execution of any person who was under the age of 18 at the time" he or she committed capital murder. *Thompson v. Oklahoma*, 487 U.S. 815, 838 (1988); *see also Stanford v. Kentucky*, 492 U.S. 361 (1989). As it has done twice before, this Court should decline to impose that sort of constitutional prophylaxis.

The States' purpose in filing this brief is a limited one. It is simply to show – using the facts of real-world cases – that there is no principled basis for concluding that 16- and 17-year-old murderers, as a class, are categorically incapable of acting with a degree of moral culpability

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[1] Virginia notes its own experience with Lee Boyd Malvo – one of the snipers who plagued Virginia and Maryland in 2002. This experience illustrates both the heinousness of the crimes of which juveniles are capable as well as the ability of jurors to take a juvenile's age into account along with other factors in determining whether to impose the death penalty. *See Commonwealth v. Malvo*, Sentencing Order, Criminal No. K102888 (Fairfax Co. Cir. Ct., March 10, 2004) available at http://www.fairfaxcounty.gov/courts/cases/malvo_orders.htm (reciting conviction of capital murder, but ordering life without parole, on jury's recommendation). The fate of such criminals should be decided on a case-by-case basis rather than by the categorical rule sought by respondent.

deserving of society's severest punishment. Adolescents are fundamentally distinguishable from the mentally retarded in that respect. This Court's decision in *Atkins v. Virginia*, 536 U.S. 304 (2002), exempting mentally retarded murderers from the death penalty rests, at bottom, on a judgment that retarded offenders are, by virtue of their limited cognitive abilities, less blameworthy than non-retarded offenders. That sort of clinical assessment simply does not hold for adolescents. Some juvenile offenders, to be sure, are not capable of the sort of cold-blooded calculation to which the death penalty is properly addressed. But others most assuredly are. And that is the point: a juvenile offender's moral culpability, if it is to have any mooring in reality, must be assessed on an individualized basis.

As this Court held in *Stanford*, "[i]n the realm of capital punishment in particular, 'individualized consideration [is] a constitutional requirement.'" 492 U.S. at 375 (quoting *Lockett v. Ohio*, 438 U.S. 586, 605 (1978)). Indeed, "one of the individualized mitigating factors that sentencers must be permitted to consider is the defendant's age." *Id.* (citing *Eddings v. Oklahoma*, 455 U.S. 104, 115-16 (1982)). There simply is no warrant, either in law or in fact, for abandoning the touchstone of individualized sentencing, which sensibly has characterized this Court's death-penalty jurisprudence for nearly a quarter century, in favor of a prophylactic rule that bears no necessary relationship to an adolescent offender's actual moral culpability. Where an individual offender – whether adolescent or adult – truly cannot appreciate the wrongfulness of his actions, he should by all means be spared the death penalty. But where an individual – again, adolescent or adult – *can* make informed moral choices, he should be held fully responsible for the human consequences of those choices.

The following summaries, abbreviated descriptions of murders committed by current Alabama death-row inmates when they were 16 or 17 years old, leave little room for doubt that *at least some* adolescent killers most

assuredly have the mental and emotional wherewithal to plot, kill, and cover up in cold blood. They should not evade full responsibility for their actions by the serendipity of chronological age.

1. Mark Anthony Duke – Age 16

Angry at being refused permission to borrow the family truck, Mark Duke (16 at the time) enlisted the aid of three co-conspirators – Brandon Samra (19), Michael Ellison (16), and David Collums (17) – to help him kill his father, Randy Duke. Aware that he would need to conceal his crime, Duke insisted that "they could not leave any witnesses." *Duke v. State*, 2002 WL 1145829, at *1 (Ala. Crim. App. May 31, 2002). Accordingly, Duke also plotted the murders of his father's girlfriend, Dedra Hunt, and her two young children, Chelisa (6 years old) and Chelsea (7 years old). *Id.* at *1-3.

Even the bare-bones facts of the crime show vividly the careful calculation with which Duke planned, executed, and tried to cover up the murders. On the evening of March 22, 1997, Duke and the three co-conspirators went to the Duke residence to ask permission to use the family truck. When his father refused, Duke became angry; he told his friends that he was tired of his father being so bossy and not letting him do what he wanted to do. Duke said that he wanted to kill his father. *Id.* at *1.

When the group returned to Ellison's house, Duke reiterated – in all seriousness – that he wanted to kill his father. Accordingly, Duke wiped the fingerprints from a .45 caliber pistol, the gun's clip, and bullets; Ellison cleaned the prints off of a .32 caliber pistol. When he had finished his preparations, Duke again said that he wanted to go to his house and kill his father – so they went. *Id.* at *1.

When the four arrived at Duke's house, Duke said – again – that he was going to kill his father (R. 1810[2]) and, further, that he would have to kill the two little girls and their mother so as to eliminate witnesses. *Duke*, 2002 WL 1145829, at *1; R. 1812. Duke, who still had the .45, asked Samra (now carrying the .32) to go in with him. R. 1812-13. After instructing Collums and Ellison to meet them in the neighborhood behind the house, Duke led Samra inside his father's house. R. 1813. According to Duke's plan, Samra was to kill Dedra Hunt; Duke would take care of his father and the little girls. R. 1814.

Dedra Hunt and her girls were on the couch by the fireplace, watching television. R. 1813. After initially waiting for Duke's father in the master bedroom, Duke and Samra went into the kitchen as Randy Duke came up from the basement and sat on the fireplace. R. 1814. Pursuant to Duke's instruction, Samra went after Dedra while Duke approached his father and shot him at close range. R. 1815. Samra shot Dedra in the face, knocking out teeth but not killing her. Dedra (now bleeding profusely) and the girls fled upstairs, with Samra in pursuit. *Duke*, 2002 WL 1145829, at *2. Meanwhile, Randy Duke begged his son to spare his life; in response, the younger Duke said that he was tired of his father not letting him do what he wanted. R. 1816. Duke raised his gun to fire another shot at his father, but the gun jammed. R. 1817. After clearing the chamber, stabbing his father numerous times, and hitting him with his fist (R. 2257-59), Duke said that he would see his father in hell and shot him between the eyes. *Duke*, 2002 WL 1145829, at *2.

Dedra Hunt had also begged for mercy. R. 1817. As she and her little girls ran upstairs, Samra chased after her, shooting at her again. Dedra managed to lock herself and one of her daughters, Chelisa, in the master

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[2] All "R. ___" references are to record pages in the cases being discussed.

bathroom. When Samra was unable to pry the door open, Duke arrived from downstairs and kicked a hole in the door, reached through, and unlocked it. Duke shot Dedra Hunt in the forehead, killing her instantly. Duke then found 6-year-old Chelisa cowering in the shower; telling her that it would only hurt for a minute, Duke slit the child's throat. *Duke*, 2002 WL 1145829, at *2.

Duke then told Samra that they had to find the other little girl, 7-year-old Chelsea. They found her hiding under a bed in one of the upstairs bedrooms. R. 1821-22. As Duke pulled Chelsea from underneath the bed, she pleaded for her life. R. 1822-23. Duke tried to slit Chelsea's throat as he had her sister's, but she struggled, in the process sustaining 15 lacerations to her face and hands. R. 1823. Samra refused to help finish the little girl off until Duke yelled at him. *Id.* Duke then held Chelsea down while Samra slit her throat. *Id.*

The gruesome murders complete, the elaborate cover-up began. Duke stole his father's wallet, fled the house, and ditched the knives in a nearby storm drain. *Duke*, 2002 WL 1145829, at *2. Afterwards, Duke and Samra met back up with Collums and Ellison – just as Duke had instructed – in the neighborhood behind the Duke home. R. 1825. Duke and Samra washed up and stashed the guns. While fleeing the scene in Ellison's truck, Duke warned his co-conspirators that he would kill them if they told anyone about the murders. R. 1826.

In an attempt to establish an alibi, the group went to see the movie "Scream" and kept the ticket stubs. *Duke*, 2002 WL 1145829, at *2. They stayed at the movie only a short time, however, before deciding to get something to eat and to play pool. R. 1829-30. During the night, they threw their bloody clothes and Randy Duke's wallet into a trash dumpster near Ellison's house. R. 1830.

The following day, at Duke's instruction, all four co-conspirators returned to the Duke home to ransack it so that police would think that a robbery had occurred. R. 1831-34. Duke then planned to telephone the police to tell them that his family had been murdered. R. 1836.

Before placing the call, the four rehearsed the alibi they would give the police if questioned. R. 1838. Duke called the police and, when questioned later, gave a statement consistent with the agreed-upon alibi.

According to the state medical examiner, Randy Duke died as a result of the gunshot between his eyes inflicted by his son. R. 2254. Another shot delivered by the younger Duke traveled downward from Randy Duke's cheek and into his shoulder. R. 2255-56. Examination of the father also revealed numerous stab wounds to the head, face, neck, and chest, as well as many contusions and bruises. R. 2257-59. Dedra Hunt suffered three gunshot wounds. R. 2263. The fatal wound was a shot to the head – again delivered by Duke. R. 2264.

Chelisa suffered two 5¼ inch lacerations – at Duke's hands – across her throat. R. 2268. She aspirated her own blood for several minutes, and then died. R. 2268-70. Chelsea sustained deep cuts on her face and neck, as well as the fatal cut across her throat. R. 2272-73. She also suffered 15 defensive wounds to her right hand and several more to her left. R. 2275-77. Like her younger sister, Chelsea aspirated her own blood for a few minutes before she died. R. 2274.

Both Duke and Samra were sentenced to death for their roles in the quadruple murders Randy Duke and Dedra, Chelisa, and Chelsea Hunt. Under the bright-line rule advanced by respondent, Duke – who was by all accounts the mastermind and ring-leader of the attack, and was in any event the trigger-man (or knife-wielder, as the case may be) in three of the four murders – would escape capital punishment, while his minion, Samra, would not. That, at least as a principle of constitutional law, is nonsensical.

2. Marcus Pressley – Age 16

During a three-month stretch in 1996, Marcus Pressley (16) committed a series of eight nearly identical

robberies resulting in the murders of three individuals and the attempted murders of three more.

Having already murdered one store clerk with a gunshot to the back (as the clerk attempted to escape), *see Presley v. State*, 770 So. 2d 104, 105-07 (Ala. Crim. App. 1999); R. 372, 495, Pressley's crime spree culminated in the grisly double-murder of a pawn broker and his employee. Pressley entered John's 280 Pawn Shop under the pretense of shopping for a stereo. Having cased the joint, Pressley returned thirty minutes later with his regular accomplice, LaSamuel Gamble (18 at the time). Pressley pulled a gun on one of the shop's employees, Janice Littleton, while Gamble forced the manager, John Burleson, to the floor at gunpoint. Pressley and Gamble stole at least 30 guns, jewelry, and $2300 in cash. *Pressley v. State*, 770 So. 2d 115, 120-21 (Ala. Crim. App. 1999). Gamble fled with the loot to the truck. R. 1217-18, 1412, 1420. Pressley stayed behind to finish the job.

Pressley first stood over John Burleson, raised his .380 revolver, and fired a shot into Burleson chin. R. 1608-09. Perceiving that Burleson was still alive, Pressley raised the gun again and pulled the trigger, but the gun jammed. R.1140, 1627. Pressley calmly paused and attempted to clear the gun. R.1140, 1413-14, 1627. Some twenty seconds later, Pressley pointed the barrel of the gun at Burleson's temple and again pulled the trigger. R.1140, 1605-08, 1627. The gun fired, and a bullet lodged in Burleson's skull, killing him. R.1140, 1605-08, 1617, 1627.

Pressley then turned to Janice Littleton. R. 1135. He raised his gun and pulled the trigger, but again the gun jammed. R.1140, 1627. As before, Pressley calmly cleared the gun. *Id.* A full thirty seconds later, having cleared the jam, Pressley aimed and fired, shooting Littleton in the back of the head, and then left her to die. R.1141, 1414-15, 1611, 1618-19, 1627. The entire gory sequence was recorded by the store's surveillance system. *Pressley*, 770 So. 2d at 121.

Both Pressley and Gamble were sentenced to death for the pawn-shop murders. Once again, the prophylactic rule advanced by respondent, if applied here, would defy common sense. Under that line, Gamble – who was 18 at the time but did not actually kill anyone – would face the death penalty,[3] but Pressley – who at 16 executed two people with startling coolness – would get a free pass. Surely the Eighth Amendment does not, as a matter of constitutional principle, mandate such a bizarre result.

3. Kenneth Loggins and Trace Duncan – Age 17

On the night of February 21, 1994, Kenneth Loggins (17), Trace Duncan (17), and two other teenage co-conspirators – Carey Dale Grayson (19) and Louis Mangione (16) – picked up hitchhiker Vickie Deblieux, who was traveling to her mother's home in Louisiana. *Loggins v. State*, 771 So. 2d 1070, 1074-75 (Ala. Crim. App. 1999); *Duncan v. State*, 827 So. 2d 838, 840-42 (Ala. Crim. App. 1999). Over her objections, the four co-conspirators took Vickie to a secluded rural area. After throwing bottles at her as she tried to escape, Loggins and Grayson tackled Vickie, and then with Duncan kicked and stomped her for some 30 minutes until she died. *Duncan*, 827 So. 2d at 841. At the end of the vicious attack, Loggins stood on Vickie's throat until she gurgled blood and then exclaimed, "Okay, I'll party."

The attackers threw Vickie's body into the back of their truck, stripped her naked, and played with her lifeless body – at one point inserting a beer bottle into her vagina. *Id.* When they had finished, they threw Vickie's body off a cliff. *Loggins*, 771 So. 2d at 1074. After disposing of the body and hiding Vickie's luggage in the

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[3] *See* Ala. Code § 13A-5-40(c) (accomplice liability for capital murder); *Tison v. Arizona*, 481 U.S. 137 (1987) (Eighth Amendment does not prohibit death penalty as disproportionate in case of defendant whose participation in felony that results in murder is major and whose mental state is one of reckless indifference).

underbrush, Loggins, Duncan, and Grayson took Mangione home and then returned to the crime scene, where they further mutilated Vickie's corpse – stabbing and cutting her 180 times, removing a portion of one lung (one reportedly even bit into it), and cutting off her fingers and thumbs. *Duncan*, 827 So. 2d at 841.

The three teens later explained the blood on their clothes and truck as having come from a stray dog. *Id.* All four co-conspirators were later arrested after Mangione was reported to have been showing off one of Vickie's severed fingers to friends. *Id.*; *Loggins*, 771 So. 2d at 1075.

Loggins, Duncan, and Grayson were all sentenced to death for their roles in Vickie's murder. Again, an arbitrary 18-year-old cut-off would result, nonsensically, in a constitutional rule permitting capital punishment for Grayson, who was 19 at the time, but not for Loggins and Duncan, both of whom were 17 but plainly are every bit as culpable – if not more so – in Vickie's death and mutilation.

4. William Thomas Knotts – Age 17

In October of 1989, William Thomas Knotts (17) and another teenager escaped from a juvenile detention facility and spent some 24 hours wandering around Montgomery County, Alabama. Angered by what he perceived to be an insult directed at him by Helen Rhodes – namely, splashing water on him with her car – Knotts located Rhodes' house so that he could "get back at her" later. *Knotts v. State*, 686 So. 2d 431, 442 (Ala. Crim. App. 1995).

After being returned to the juvenile facility, Knotts escaped again some two weeks later. Knotts headed straight for Helen Rhodes' home, stopping on the way to burglarize two other houses to steal guns, ammunition, cash, food, and clothing. *Id.* at 442.

Knotts broke into Helen Rhodes' home, placed his wet clothes and shoes in her dryer, and waited for her to

return. Knotts waited there, he said, "approximately an hour and a half . . . for her to come home so he could shoot her for splashing water on him." *Id.* at 443. While he waited, Knotts watched television and wrote a note to be left at the scene – intended to mislead police to believe that the murder he planned to commit was gang-related. When Helen arrived home with her two-year-old son, Knotts shot her in the arm. As her young son screamed, Knotts shot Helen a second time in the back. She died almost immediately. *Id.* at 442.

Fearing that someone might have heard the shots, Knotts gathered his loot from the earlier burglaries along with Helen's purse and her husband's shoes and travel kit, and then left town in her car. Helen's husband returned four to five hours later to discover "his wife's body and his son, whose clothing was soaked with his mother's blood, sitting beside her body, crying." *Id.* at 443.

5. Renaldo Chante Adams – Age 17

During the evening of August 20, 1997, Andrew Mills fell asleep on his couch watching television – his wife Melissa and their three young children were asleep in their rooms. He was later awakened by an intruder, Renaldo Adams (17), wearing a stocking pulled over his head. *Adams v. State*, 2003 WL 22026043, at *1 (Ala. Crim. App. Aug. 29, 2003).

As Adams threatened Mills with a knife, Mills begged Adams not to harm his family – offering Adams money if he would leave them unharmed. Adams ordered Mills to the couch and proceeded to the bedroom where Melissa was sleeping. When Mills heard the bedroom door open, he crept toward the bedroom, where he discovered Adams on top of his wife. Mills told Adams that his wife was four months pregnant and again pleaded with Adams not to harm his family. *Id.* at *1. Adams then jerked Melissa off the bed and held her hostage with a boning knife. R. 426. Adams forced Melissa back to the living area, took her engagement ring and what little cash was in the

house, and then ordered Mills to go to an ATM for more money. R. 426-27. Mills, of course, agreed and soon returned with $375 – the maximum amount that could be withdrawn in a single transaction. Adams was not satisfied; he sent Mills back out for more money. *Adams*, 2003 WL 22026043, at *1.

Mills drove to a grocery store where a store employee called police. Mills informed the 911 operator that an intruder was holding his family at knifepoint, and officers were dispatched immediately to his home. *Id.*

Back at the house, Mills and police initially were unable to gain entry because the front door was locked. Eventually, one of the Mills' young daughters opened the door. As police officers chased Adams through the house, Mills' daughters directed him to their mother. R. 437. Mills found his wife in the bedroom soaked in her own blood and gasping for breath. *Adams*, 2003 WL 22026043, at *1. She, along with her unborn child, died three hours later from massive blood loss caused by repeated stab wounds to the neck, liver, and lungs; Adams had raped her before killing her. *Id.* at *2.

6. Timothy Davis – Age 17

Sixty-eight year old Avis Alford was working alone in her grocery store in Coosa County, Alabama, when Timothy Davis (17) entered. Davis proceeded to rob, sodomize, and brutally murder Mrs. Alford – stabbing her 17 times in the back with a common steak knife. *Davis v. State*, 554 So. 2d 1094, 1096-97 (Ala. Crim. App. 1984).

Shortly after police discovered Alford's nude body, Davis, along with his wife and mother, came to the scene and told police that he had earlier found Mrs. Alford's body and that he had panicked and fled. He further said that he had gotten blood on his clothing from lifting her body and had returned home to change before making a report of the murder. Finally, Davis stated that he had seen two black men leaving the area after he discovered

the body; when pressed, Davis could not give a description of either one. *Id.* at 1097.

Human sperm was recovered from Mrs. Alford's rectum. *Id.* at 1097. A stain composed of the combination of human sperm, fecal matter, and tissue from the inside of the rectum, was recovered from the crotch area of the underwear Davis had been wearing. *Id.* at 1098. Blood stains matching Mrs. Alford's blood type were also found on the inside of Davis's jeans and splattered across his motorcycle helmet. *Id.* at 1097. Davis later admitted the crime to a fellow inmate while awaiting trial. *Id.* at 1098.

CONCLUSION

If the cases detailed in this brief show anything, it is that there is no magic in the age 18. Just as there are adults who, for whatever reason, cannot fully comprehend the wrongfulness of their actions, there are adolescents – 16 and 17 year-olds, to be sure – who *can*. A teenager who plots like an adult, kills like an adult, and covers up like an adult should be held responsible for his choices like an adult.

Because 18 is not "the age before which *no one* can reasonably be held fully responsible" for the murder of another human being, *Stanford*, 492 U.S. at 376 (plurality opinion), the judgment of the Supreme Court of Missouri – which rests on an arbitrary and ultimately unsupportable prophylactic line – should be reversed.

Respectfully submitted,

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Respondent.

On Writ of Certiorari
To The Supreme Court of Missouri

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Eddings v. Oklahoma, 455 U.S. 104 (1982) 7, 15

Enmund v. Florida, 458 U.S. 782 (1982) 6

Gregg v. Georgia, 428 U.S. 153 (1976) 5

Harmelin v. Michigan, 501 U.S. 957 (1991) 17

Lockett v. Ohio, 438 U.S. 586 (1978) 13

Penry v. Lynaugh, 492 U.S. 302 (1989) 17

People v. Olsen, 36 Cal. 3d 638 (Cal. 1984) 7

People v. Wise, 752 N.Y.S.2d 837 (N.Y. App. Div. 2002) 14

Stanford v. Kentucky, 492 U.S. 361 (1989) ..... *passim*

State ex rel Simmons v. Roper, 112 S.W.3d 397 (Mo. 2003) 18

Thompson v. Oklahoma, 487 U.S. 815 (1988) ..... *passim*

Trop v. Dulles, 356 U.S. 86 (1958) 17

LEGISLATIVE MATERIALS

Senate Bill 513, 2003 N.H. SB 513 18

Senate Bill 182, 2004 S.D. SB 182 18

Original House Bill No. 5, 2004 Wyo. Sess. Laws 29 18

MISCELLANEOUS

ABA, Criminal Justice Section, *Report with Recommendations to the House of Delegates*, Report No. 117A (August 1983) 3

ABA, *Juvenile Death Penalty Resources and Information*, http://www.abanet.org/crimjust/juvjus/resources.html 19

ABA, *Report with Recommendations No. 107* (February 1997) 3, 20

ABA, *Summary of Actions of the House of Delegates*, 1983 *Annual Meeting, Reports of Sections*, 17 3

Amnesty International, *The Exclusion of Child Offenders From the Death Penalty Under General International Law* (July 2003) 20

A. A. Baird *et al.*, *Functional Magnetic Resonance Imaging of Facial Affect Recognition in Children and Adolescents*, 38 J. Am. Academy of Child and Adolescent Psychiatry 195 (1999) 10

B. Bradford Brown, *Peer Groups and Peer Cultures, in At the Threshold: The Developing Adolescent* (S. Shirley Feldman and Glen R. Elliot eds., 1990) 10, 15

Ronald Dahl, *Affect Regulation, Brain Development, and Behavioral/ Emotional Health in Adolescence*, 6 CNS Spectrums 60 (2001)..... 10

Drizin & Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. Rev. 891 (2004) 14

Jeffrey Fagan, *Atkins, Adolescence, and the Maturity Heuristic: Rationales for a Categorical Exemption for Juveniles from Capital Punishment*, 33 N.M. L. Rev. 207 (2003)..... 6, 8

Martin R. Gardner, *The Mens Rea Enigma: Observations on the Role of Motive in the Criminal Law Past and Present*, 1993 Utah L. Rev. 635 (1993) 7

William Gardner, *A Life-Span Rational-Choice Theory of Risk Taking, in Adolescent Risk Taking* (Nancy J. Bell and Robert W. Bell, eds.1993) 9

William Gardner and Janna Herman, *Adolescents' AIDS Risk Taking: A Rational Choice Perspective, Adolescents in the AIDS Epidemic* (William Gardner *et. al.* eds., 1990)..... 10

Elkohon Goldberg, *The Executive Brain: Frontal Lobes and the Civilized Mind* (Oxford University Press 2001)... 10

Gross, Jacoby, Matheson, Montgomery & Patil, *Exonerations in the United States*, 1989 through 2003 (April 19, 2004) http://www.law.umich.edu/NewsAndInfo//exonerations-in-us.pdf 14

IJA/ABA *Juvenile Justice Standards* (1980) 2, 3

Dorothy Otnow Lewis *et. al., Neuropsychiatric, Psychoeducational and Family Characteristics of 14 Juveniles Condemned to Death in the United States*, 145 American Journal of Psychiatry 584 (May 1988)..... 16

Elizabeth S. Scott and Laurence Steinberg, *Blaming Youth*, 81 Tex. L. Rev. 799 (Feb. 2003)..... 10

E. R. Sowell *et al., In Vivo Evidence for Post-Adolescent Brain Mutation in Frontal and Striatal Regions*, 2 Nature Neuroscience 859 (1999)..... 10

Patricia Spear, *The Adolescent Brain and Age-Related Behavioral Manifestations*, 24 Neuroscience & Biobehavioral Revs. 417 (2000) 10

Laurence Steinberg & Elizabeth Cauffman, *Maturity of Judgment in Adolescent Decision Making*, 20 Law & Hum. Behav. 249 (1996)..... 9

UPI, *Judge Frees Wrongly Convicted Man* (Jan. 16, 2001)..... 14

Andrew Walkover, *The Infancy Defense in the New Juvenile Court*, 31 UCLA L. Rev. 503 (1984)..... 7

Henry Weinstein, *DNA Testing Clears Texas Murderer and "Accomplice,"* p. A-1 (Los Angeles Times, (Oct. 14, 2000) 14

BRIEF *AMICUS CURIAE* OF THE AMERICAN BAR ASSOCIATION IN SUPPORT OF THE RESPONDENT

INTEREST OF THE *AMICUS*

The American Bar Association ("ABA") is the principal voluntary national membership organization of the legal profession. Its more than 400,000 members include prosecutors, public defenders, lawyers in private practice, legislators, law professors, law enforcement and corrections personnel, law students, and a number of non-lawyer "associates" in allied fields.[1]

Almost since its inception, the ABA has taken an active role in advocating for the improvement of the justice system, and the ABA has taken a special interest in the improvement of the juvenile justice system. In conjunction

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[1] Pursuant to Rule 37.6, *amicus curiae* certifies that no counsel for a party authored this brief in whole or in part and that no person or entity, other than *amicus*, its members or its counsel has made a monetary contribution to the preparation or submission of this brief. Letters from the parties consenting to the filing of this brief have been filed with the Clerk of this Court.

Neither this brief nor the decision to file it should be interpreted to reflect the views of any judicial member of the American Bar Association. No inference should be drawn that any member of the Judicial Division Council has participated in the adoption or endorsement of the positions in this brief. This brief was not circulated to any member of the Judicial Division Council prior to filing.

with the Institute of Judicial Administration ("IJA"), the ABA spent over nine years developing standards for the administration of juvenile justice, which culminated in the adoption of the IJA/ABA *Juvenile Justice Standards* in 1980 (the "Standards"). These Standards flowed from an exhaustive historical, legal and criminological study of society's response to juvenile crime. They reflect the experience of trained legal practitioners in a number of disciplines and are also informed by the experience of related professions that work with juvenile offenders.[2]

In addition, the ABA includes many members who are prosecutors or defense attorneys with significant experience and special expertise in the treatment of juvenile offenders under the law. The ABA Juvenile Justice Center and ABA Death Penalty Representation Project are composed of lawyers who specialize, respectively, in juvenile justice and death penalty issues. The Death Penalty Representation Project has recruited numerous *pro bono* lawyers to represent juveniles in capital cases.

Thus, the ABA, through its nationwide membership, its committees and its projects, has a substantial pool of experts with experience and insights relating to issues presented by this case. Based upon the extensive work of the ABA and its members with juveniles, the ABA endorses criminal justice policies that take into account factors unique to juveniles that affect their culpability, including the fact that juvenile offenders are less mature, less experienced, less able to exercise good judgment and self-restraint, more susceptible to environmental influence, and limited in their ability to assist in their own defense.

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[2] As used in this brief, the terms "juvenile offenders" and "juveniles" refer to persons under the age of eighteen.

The ABA also has been active in addressing the issue of the mentally retarded and the death penalty. The ABA drew upon this experience in its *amicus* brief filed in *Atkins v. Virginia*, 536 U.S. 304 (2002).

Although the ABA has a longstanding policy of taking no position on the death penalty as a general matter, it does oppose the death penalty for juvenile offenders. This position was first expressed in a resolution passed by the ABA House of Delegates in 1983, which states that the ABA opposes "the imposition of capital punishment upon any person for any offense committed while under the age of eighteen." ABA, *Summary of Actions of the House of Delegates, 1983 Annual Meeting, Reports of Sections, 17.* The 1983 resolution culminated nearly two years of research, reflection and debate by the ABA Section on Criminal Justice.[3] The ABA reaffirmed this position in a resolution passed by the ABA House of Delegates in 1997, supporting a moratorium on the death penalty until states implement a number of features, including establishment of a minimum age of eighteen for the death penalty. ABA, *Report with Recommendations No. 107* (February 1997).

The ABA recognizes that some juvenile offenders deserve severe punishment for their crimes. However, when compared to adults, juvenile offenders' reduced capacity – in moral judgment, self restraint and the ability to resist the influence of others – renders them less responsible and less morally culpable than adults. *See* IJA/ABA *Juvenile Justice Standards Relating to Transfer Between Courts*, 3 (1980). The ABA therefore believes that the moral culpability of juvenile offenders is such that they should not be subject to

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[3] ABA, Criminal Justice Section, *Report with Recommendations to the House of Delegates*, Report No. 117A (August 1983).

the ultimate punishment, reserved for the worst crimes and offenders – the death penalty.

SUMMARY OF ARGUMENT

1. Juvenile offenders generally do not have the heightened moral culpability that the Court requires for the imposition of the death penalty. *See, e.g. Atkins v. Virginia*, 536 U.S. 304 (2002) (holding that mentally retarded persons do not have the required heightened moral culpability). The law has long recognized that juveniles have a reduced level of moral culpability due to their reduced capacity for sense and reason and the fact that they generally are more impulsive and less self-disciplined than adults, and this conclusion has been bolstered by recent scientific studies. Moreover, the reduced capacity of juvenile offenders means that retribution and deterrence rationales for the death penalty are inapplicable and that juveniles face a special risk of wrongful conviction and of receiving unjustified death sentences.

2. Since 1989, when the Court held that the execution of individuals who commit crimes when they are sixteen- or seventeen-years-old did not offend the Constitution, *Stanford v. Kentucky*, 492 U.S. 361 (1989), there have been significant developments in the law and society that necessitate reconsideration of this precedent. Since 1989, many states have shunned the execution of sixteen- and seventeen-year-old offenders, reflecting a broadening national consensus against putting juveniles to death. Only seven of the fifty states have executed juveniles in the past 30 years, and only approximately one-third of all states permit imposition of the death penalty against offenders under eighteen. This legislation and the empirical evidence upon which it is based reflects a general recognition that juveniles under age eighteen share deficits,

like mentally retarded individuals, that make it inappropriate to subject them to the ultimate punishment reserved for the most morally culpable members of society.

The Court recently found the imposition of the death penalty on mentally retarded persons to be unconstitutional in *Atkins* based on similar grounds. The ABA respectfully requests that the Court reconsider its decision in *Stanford v. Kentucky*, and recognize, as it has in the context of executing those who are mentally retarded, that the execution of juvenile offenders constitutes cruel and unusual punishment in violation of the U.S. Constitution.

ARGUMENT

I. AS A CLASS, JUVENILE OFFENDERS DO NOT POSSESS THE HEIGHTENED MORAL CULPABILITY REQUIRED TO JUSTIFY THE DEATH PENALTY.

A. To Deserve A Sentence Of Death, A Defendant Must Possess A Degree Of Moral Culpability Beyond That Necessary To Find Guilt.

The Court's jurisprudence establishes that, in order to satisfy the Eighth Amendment, the death penalty must be used only in cases where the conduct of the defendant or the nature of the crime demonstrates a heightened level of moral culpability beyond that needed to establish guilt. Thus, since *Gregg v. Georgia*, 428 U.S. 153 (1976), capital punishment has been permitted in the United States only for those who commit the most egregious crimes. Following this principle, the Court has held that execution is an impermissible punishment for the rape of an adult woman, *Coker v. Georgia*, 433 U.S. 584 (1977), and for a felony murderer who "did not take life, attempt to take it, or intend

to take life . . . ." *Enmund v. Florid*a, 458 U.S. 782, 789-93 (1982). Indeed, even "the culpability of the average murderer is insufficient to justify the most extreme sanction available to the State . . . ." *Atkins v. Virginia*, 536 U.S. 304, 319 (2002). Only those offenders who are capable of and exhibit heightened moral culpability – beyond that sufficient to impose criminal liability – are subjected to the possibility of a death sentence. For the reasons explained below, youths under eighteen cannot be said to possess the degree of moral culpability required to justify a sentence of death.

B. Juveniles Have A Lesser Culpability Than Adults.

Many areas of the law have long acknowledged what society (especially parents) has long understood – that juveniles are less culpable than adult offenders because they are more likely as a group to be less capable than adults of fully comprehending the consequences of their actions and controlling their behavior. Historically, children were treated under Anglo-Saxon criminal law as if they were mental incompetents. Children under the age of seven were presumed conclusively to be incapable of criminal acts because they were thought to be unable to know right from wrong or to engage in the requisite intentional conduct. *See Clay v. State*, 143 Fla. 204, 208 (Fla. 1940) ("[i]t is well established at common law that a child under the age of 7 years is conclusively presumed to be incapable of committing a crime . . . ."); s*ee also* Jeffrey Fagan, *Atkins, Adolescence, and the Maturity Heuristic: Rationales for a Categorical Exemption for Juveniles from Capital Punishment*, 33 N.M. L. Rev. 207, 226 (2003) ("Fagan"). At the same time, the criminal law generally created a rebuttable presumption of incapacity for children between the ages of seven and fourteen, a presumption that the prosecution bore the burden to overcome. *See People v. Olsen*, 36 Cal. 3d

638, 647 (Cal. 1984) (". . . statute creates a rebuttable presumption that children under the age of 14 are incapable of knowing the wrongfulness of their actions and, therefore, are incapable of committing a crime"); *Clay*, 143 Fla. at 208 ("the common law rule raises a presumption of incapacity of an infant between the ages of 7 and 14"). These presumptions at law were based on an "unwillingness to punish individuals incapable of forming criminal intent and thus incapable of assuming responsibility for their acts." Andrew Walkover, *The Infancy Defense in the New Juvenile Court*, 31 UCLA L. Rev. 503, 512 (1984).

As the law evolved, it departed from the "incapacity" theory and instead concluded that children lacked culpability because they had a reduced capacity for sense and reason and lacked the ability to "function as moral agents rationally choosing their evil designs." Martin R. Gardner, *The Mens Rea Enigma: Observations on the Role of Motive in the Criminal Law Past and Present*, 1993 UTAH L. Rev. 635, 662 (1993). As this Court has stated:

> youth is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage. [As a result,] [o]ur history is replete with laws and judicial recognition that [juveniles] . . . are less mature and responsible than adults.

Eddings v. Oklahoma, 455 U.S. 104, 115 (1982). It thus is widely acknowledged in the law that "[juveniles] are more vulnerable, more impulsive and less self-disciplined than adults . . . [and] may have less capacity to control their conduct and to think in long-range terms than adults . . . ," characteristics that explain "[t]he reasons why juveniles are not trusted with the privileges and responsibilities of an

adult . . . ." *Thompson v. Oklahoma*, 487 U.S. 815, 834-35 (1988) (plurality opinion) (citations omitted).

Society's recognition that juveniles under eighteen do not possess the same capacity for mature reasoning that adults have is so deeply engrained that state and federal legislation has universally given juveniles distinct status in many areas of the law. *See Thompson*, 487 U.S. at 823-25 (plurality opinion). These legislative determinations include numerous age-based classifications that recognize eighteen as the minimum age that juveniles must attain before they are capable of making rational, informed decisions and taking responsibility for their actions. Consequently, juveniles are accorded a status different from adults in a number of areas of the law, including contract law and family law, as well as in several areas regulating conduct, such as the right to vote, to drink alcohol, and a growing body of restrictions on when and with whom juveniles under eighteen may operate automobiles. *Id.*; *see generally*, Fagan, *supra*, at 223-24.

In *Atkins*, the Court held that the Eighth Amendment prohibits the execution of mentally retarded offenders based on evidence that mentally retarded persons have "diminished capacities" that render them less socially and mentally developed than non-mentally retarded adults. Their diminished cognitive functioning – and the corresponding limitations and challenges that flow therefrom – so reduce their moral culpability that the Court has drawn a bright-line rule holding unconstitutional the imposition of the death penalty on the mentally retarded. 536 U.S. at 321. Specifically, the Court in *Atkins* found:

> [m]entally retarded persons frequently know the difference between right and wrong and are competent to stand trial. Because of their impairments, however, by definition they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others.

Id. at 318. The Court further recognized that mentally retarded persons "often act on impulse rather than premeditated plan," are susceptible to influence, and are generally followers. *Id.* These deficits render the mentally retarded unable to appreciate the correlation between their actions, the consequences of those actions and the subsequent punishment for those actions, and therefore unable to alter their actions in accordance with their moral judgment. "[These] deficiencies do not warrant an exemption from criminal sanctions, but they do diminish their personal culpability." *Id.*

Juveniles share nearly all of the developmental characteristics of the mentally retarded that support their categorical ineligibility for the death penalty. Like the mentally retarded, juveniles have decreased abilities to regulate their actions, understand the correlation between their actions and the consequences of those actions, and to appreciate the impact of the resulting punishment for their actions.[4] Moreover, recent scientific research supports the

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[4] *See* William Gardner, *A Life-Span Rational-Choice Theory of Risk Taking, in Adolescent Risk Taking* 78-79 (Nancy J. Bell & Robert W. Bell eds., 1993); Laurence Steinberg & Elizabeth Cauffman, *Maturity of Judgment in Adolescent Decision Making*, 20 Law & Hum. Behav. 249 (1996) (noting that juveniles have lesser capacity in the following components of

conclusion that the brains of juveniles are less developed than those of non-mentally retarded adults.[5] Moreover,

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the decision-making process: (1) autonomous choice, (2) self-management, (3) risk perception, and (4) calculation of future risks); William Gardner & Janna Herman, *Adolescents' AIDS Risk Taking: A Rational Choice Perspective*, Adolescents in the AIDS Epidemic 24 (William Gardner *et. al.* eds., 1990) (noting that juveniles give disproportionate weight to the short term effects of their actions); and B. Bradford Brown, *Peer Groups and Peer Cultures, in At the Threshold: The Developing Adolescent* 171 (S. Shirley Feldman and Glen R. Elliot eds., 1990)("Feldman & Elliot") (noting that juveniles are more susceptible to peer influence than non-mentally retarded adults).

[5] *See* Patricia Spear, *The Adolescent Brain and Age-Related Behavioral Manifestations*, 24 Neuroscience & Biobehavioral Revs. 417 (2000); E. R. Sowell *et al., In Vivo Evidence for Post-Adolescent Brain Mutation in Frontal and Striatal Regions,* 2 Nature Neuroscience 859 (1999); Elkohon Goldberg, *The Executive Brain: Frontal Lobes and the Civilized Mind* (Oxford University Press 2001) pp. 144-145; A. A. Baird *et al., Functional Magnetic Resonance Imaging of Facial Affect Recognition in Children and Adolescents*, 38 J. Am. Academy of Child & Adolescent Psychiatry 195 (1999); Elizabeth S. Scott and Laurence Steinberg, *Blaming Youth*, 81 Tex. L. Rev. 799, 801 (Feb. 2003)(citing Ronald Dahl, *Affect Regulation Brain Development, and Behavioral/ Emotional Health in Adolescence*, 6 CNS Spectrums 60 (2001)).

juveniles have fewer life experiences to inform their decision making. Thus, like the mentally retarded, while juveniles may know the difference between right and wrong and may be competent to stand trial, they are less competent decision makers than non-mentally retarded adults because they have underdeveloped decision making capacities.

In light of their developmental similarities, what the Court said of the mentally retarded in *Atkins* applies equally to juvenile offenders: "Because of their [deficiencies] in areas of reasoning, judgment, and control of their impulses, they do not act with the level of moral culpability that characterizes the most serious adult criminal conduct." 536 U.S. at 306. These deficiencies reduce juvenile offenders' moral culpability so significantly that a categorical bar on the imposition of the death penalty is constitutionally required.

C. As With The Mentally Retarded, Neither Retribution Nor Deterrence Justifies The Execution Of Juvenile Offenders.

Atkins also recognized that the two purported justifications for the death penalty – retribution and deterrence – are not served by executing the mentally retarded. Again, because their cognitive impairments prevent them from "[acting] with the level of moral culpability that characterizes the most serious criminal conduct," the retribution or "just deserts" rationale for the death penalty is inapplicable to the mentally retarded. 536 U.S. at 306. Similarly, the deterrence justification is without force because the cognitive impairments of mentally retarded individuals "make it less likely that they can process the information of the possibility of execution as a penalty and, as a result, control their conduct based upon that information." *Id.* at 320.

These same rationales apply as well to juvenile offenders. Because the retribution justification for the imposition of the death penalty is based principally on the moral culpability of offenders, and because juveniles are less morally culpable than adults, the retribution rationale for the death penalty is also inapplicable to juvenile offenders.

Nor is deterrence served by executing juvenile offenders, rather than imposing severe prison sentences for their crimes. As discussed above, the state of adolescence can be characterized by poor impulse control, an inability to envision the consequences of one's acts, and a belief in one's own invincibility. Because of these characteristics, the threat of the death penalty does not add any meaningful deterrent effect beyond the threat to a juvenile of being tried as an adult and imprisoned for life.

There is an additional reason why the death penalty is inappropriate for juvenile offenders that makes juveniles even less deserving of the death penalty: society generally recognizes that juvenile offenders are more capable of rehabilitation than adults.

D. Juveniles, Like The Mentally Retarded, Face A Special Risk Of Wrongful Conviction And Of Receiving Unjustified Death Sentences.

An additional and equally compelling reason for instituting a categorical rule against the execution of juvenile offenders is the heightened risk of a tragic miscarriage of justice, either through the conviction of a factually innocent defendant of a capital crime or the unjustified imposition of a death sentence. As the Court in *Atkins* concluded:

> [t]he risk "that the death penalty will be imposed in spite of factors which may call for a less severe penalty," *Lockett v. Ohio*, 438 U.S. 586, 605 (1978), is enhanced, not only by the possibility of false confessions, but also by the lesser ability of mentally retarded defendants to make a persuasive showing of mitigation in the face of prosecutorial evidence of one or more aggravating factors. Mentally retarded persons may be less able to give meaningful assistance to their counsel and are typically poor witnesses, and their demeanor may create an unwarranted impression of lack of remorse for their crimes.

Atkins, 536 U.S. at 320-21. Like the mentally retarded, juveniles are less effectively protected by important safeguards that serve to assure reliable results in criminal trials and sentencing proceedings. This deficiency, coupled with their immaturity, could "jeopardize the reliability and fairness of capital proceedings against [them]." *See Atkins, 536 U.S.* at 306-07.

First, juveniles' developmental limitations subject them to the increased possibility of being wrongfully convicted of capital crimes they did not commit. In particular, juveniles, like the mentally retarded, are more susceptible to coercion and more likely to be intimidated into making false confessions than are adults.

Indeed, there are a number of cases where it has been determined by objective evidence that juveniles falsely confessed to crimes they did not commit, including grisly crimes. The Central Park Jogger case is a well known example of a situation where juveniles made such erroneous

confessions and were exonerated only after they completed their lengthy sentences.[6] Likewise a teenage offender on death row in Texas was recently found, on the basis of DNA evidence, to have been innocent of a rape and murder to which he confessed as a juvenile.[7]

These examples are part of a disturbing pattern as demonstrated by a recent study of exoneration cases since 1989, conducted by researchers at the University of Michigan School of Law, where the defendants' convictions were nullified by official acts by governors, courts or prosecutors because of compelling evidence that they were not guilty. Gross, Jacoby, Matheson, Montgomery & Patil, *Exonerations in the United States*, 1989 through 2003 (April 19, 2004).[8] This examination found that 44% of the juveniles exonerated during that period had falsely confessed to crimes they did not commit. *Id.* at 20-21. *See also* Drizin & Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. Rev. 891, 966-68 (2004)(describing 40 false confessions by juveniles).

The higher risk of wrongful conviction among juveniles is unsurprising in view of developmental deficiencies described in Section I.B. above that make

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6 *See People v. Wise*, 752 N.Y.S.2d. 837 (N.Y. App. Div. 2002).

7 *See* UPI, *Judge Frees Wrongly Convicted Man* (Jan. 16, 2001); Henry Weinstein, *DNA Testing Clears Texas Murderer and "Accomplice,"* p. A-1 (Los Angeles Times, (Oct. 14, 2000).

8 This report can be accessed at: http://www.law.umich.edu/ NewsAndInfo/ /exonerations-in-us.pdf.

juveniles less able than adults to assist in their defense at trial. Juveniles are less capable than adults of communicating with and giving meaningful assistance to their counsel. Juveniles tend to telescope the future and do not appreciate long-term consequences of their actions, impairing their ability to make appropriate decisions regarding plea bargains and other aspects of their legal strategy. Juveniles also lack sufficient experience to help them recognize exculpatory facts and communicate them to their counsel. As the Court held in the case of the mentally retarded, these limitations weigh against imposing the death penalty against juveniles. *See Atkins*, 536 U.S. at 320-21.

Juveniles, like the mentally retarded, likewise risk an increased possibility of being wrongly convicted of capital offenses when lesser degrees of homicide are the appropriate verdicts. Juveniles face this risk not only because of the factors discussed above, but because they are more likely to exaggerate their roles in crimes due to pressure from peers or older co-defendants, out of a desire to show off, or in order not to show their fear. *See generally*, *Eddings*, 455 at 115; *Thompson*, 487 at 835; Feldman and Elliot.

Finally, like those with mental retardation, juveniles are exposed to an increased risk of being sentenced to death in cases where, were all available mitigating evidence presented, the sentence would be less than death. In particular, juveniles are less able than adults to assist in developing mitigating evidence in the penalty phase of their trial. The characteristics of adolescence that subject teenagers to a greater risk of wrongful conviction or a capital conviction (*e.g.*, their lack of experience in recognizing exculpatory facts and their susceptibility to exaggerating or mischaracterizing their role) also are similar to characteristics of the mentally retarded that the Court found impedes their ability to "make a persuasive showing of

mitigation in the face of prosecutorial evidence of one or more aggravating factors." *See Atkins*, 536 U.S. at 320. These characteristics are common among sixteen- and seventeen-year-olds, not just among youth aged fifteen and below.

In particular, juveniles' immaturity and/or embarrassment often impedes their disclosure of prior emotional, physical or sexual abuse, crucial evidence that frequently forms the bedrock of mitigation in capital proceedings. Similarly, juveniles are less likely than adults to disclose mental health problems or to have their mental illnesses diagnosed, and by virtue of their age, are less likely to have received treatment for existing disorders. Dorothy Otnow Lewis *et. al., Neuropsychiatric, Psychoeducational and Family Characteristics of 14 Juveniles Condemned to Death in the United States*, 145 American Journal of Psychiatry 584 (May 1988). Thus, the corroborating evidence so necessary to prepare adequate mitigation defenses often has not been presented to juries in juveniles' death penalty trials, leading to death sentences in instances where such sentences would be inappropriate if all the mitigating facts were known.

II. THERE IS A GROWING NATIONAL AND INTERNATIONAL CONSENSUS THAT THE DEATH PENALTY IS INAPPROPRIATE FOR JUVENILE OFFENDERS.

In *Atkins*, the Court held that Eighth Amendment claims of excessive punishment must be based on society's evolving standards of decency:

> A claim that punishment is excessive is judged not by the standards that prevailed in 1685 when Lord Jeffreys presided over the "Bloody Assizes" or when the Bill of Rights was adopted, but rather by those that currently prevail. As Chief Justice Warren explained in his opinion in *Trop v. Dulles*, 356 U.S. 86 (1958): "The basic concept underlying the Eighth Amendment is nothing less than the dignity of man . . . The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Id.* at 100-01.

536 U.S. at 311-12. The Court went on to note that "evolving standards should be informed by 'objective factors to the maximum possible extent,'" and "that the 'clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures.'" *Id.* at 312 (quoting *Harmelin v. Michigan*, 501 U.S. 957, 1000 (1991); *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989)).

The Court considered such objective evidence regarding state legislation in each of its two most recent decisions regarding the constitutionality of the death penalty for juveniles. In *Thompson v. Oklahoma*, the Court relied on the fact that every state with a death penalty statute on the books required that the defendant be at least sixteen at the time of the capital offense, and thus set sixteen as the minimum age for eligibility for the death penalty under the Eighth Amendment. 487 U.S. at 829. When the Court refused to increase the minimum age to eighteen in *Stanford v. Kentucky*, the Court found that 25 of the 37 death penalty states permitted the execution of juvenile offenders. 492 U.S. at 370.

National standards regarding the execution of juvenile offenders have substantially evolved since the *Stanford* decision. As the Supreme Court of Missouri here

found, since 1989, five more states have established eighteen as the minimum age for capital offenses.[9] This trend, moreover, is steadily progressing: since the time of the Missouri Court's decision in this case below, South Dakota and Wyoming enacted laws raising the minimum eligible age for the death penalty to eighteen years.[10]

By contrast, no state has lowered the minimum age from eighteen since the Court's *Stanford* decision. As a result, and taking into account the Missouri Supreme Court's ruling here, only 19 of the 50 states – little more than one third of all states and less than 50% of the 39 states that allow the death penalty -- now permit the execution of offenders under eighteen. Moreover, eighteen is the minimum statutory age for the federal death penalty in both the civilian and military courts.[11]

In *Atkins*, the Court also looked at evidence other than enacted legislation, holding that "the objective evidence,

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9 Montana, Indiana and Washington raised the minimum age to eighteen, while Kansas and New York enacted death penalty legislation that established eighteen as the minimum age. *See State ex rel Simmons v. Roper*, 112 S.W.3d 397, 408 (Mo. 2003).

10 Senate Bill 182, 2004 S.D. SB 182; Original House Bill No. 5, 2004 Wyo. Sess. Laws 29 (to be codified at Wyo. Stat. 6-2-101(b)). In addition, the New Hampshire legislature passed legislation raising the minimum age to eighteen only to see that legislation vetoed by the governor. Senate Bill 513, 2003 N.H. SB 513 (vetoed May 10, 2004).

11 *See Simmons*, 112 S.W.3d at 408.

though of great importance, did not 'wholly determine' the controversy." *Atkins*, 536 U.S. at 313 (quoting *Coker v. Georgia*, 433 U.S. at 597). For example, the Court relied on the fact that only a few states with laws permitting the execution of the mentally retarded actually engaged in such executions in practice. *Atkins*, 536 U.S. at 316. The Missouri Court explained in detail how the same is true today with respect to juveniles. Only twelve states currently have juvenile offenders on death row, and only seven states have actually executed a juvenile since 1976.[12] In this small group of states, only 22 juveniles have actually been executed, and thirteen of them (almost 60 percent) have been executed in Texas alone.[13] This high concentration of executions of juvenile offenders in a single state further illustrates that such executions are not the norm for most of our society. These developments evidence a compelling national consensus that 18 should be the minimum age for the application of the death penalty.

It is especially telling that the solidifying national consensus against the execution of juveniles comes during an era when states otherwise are lowering the age for juvenile offenders to be treated as adults and expanding the class of crimes that subject juveniles to adult jurisdiction and punishment. Yet, since *Stanford*, despite the trend towards more vigorous application of adult criminal jurisdiction to

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12 The ABA has developed a web page entitled *Juvenile Death Penalty Resources & Information*, which contains detailed statistics regarding the execution of juveniles and the number of juveniles on death row. The address of this web page is http://www.abanet.org/crimjust/juvjus/resources.html

13 *Id.*

juveniles, no state has joined the diminished ranks of those willing to execute juvenile offenders. State and federal legislators, and the public they represent, recognize that, when it comes to juveniles, the death penalty is different.

The consensus against the execution of juvenile offenders also is evidenced by the positions of national organizations with interest, expertise, and experience in this issue, including the ABA, the leading organization representing the legal profession. While it is true that the ABA opposed the death penalty for juvenile offenders prior to the *Stanford* decision, the ABA reconfirmed that position subsequent to *Stanford* when it supported a moratorium against the death penalty until, *inter alia*, the death penalty has been eliminated for juvenile offenders. ABA, *Report with Recommendations No. 107* (February 1997).

Finally, the United States is virtually alone among the world's nations in permitting the execution of juvenile offenders, a factor this Court considered in *Thompson* and again in *Atkins*. *Thompson*, 487 U.S. at 830-31; *Atkins*, 536 U.S. at 316 n.21. Since 2000, the only other countries reported to have executed juveniles are the Democratic Republic of Congo, Iran and Pakistan, and of these countries, Pakistan recently has raised the death penalty eligibility age to eighteen.[14] Moreover, the executions of juvenile offenders in these countries were under special circumstances, leaving the United States as the only country in the world that openly continues to execute juvenile

[14] Amnesty International, *The Exclusion of Child Offenders From the Death Penalty Under General International Law*, 6 (July 2003).

offenders within the framework of its regular criminal justice system.[15]

[15] *Id.*

CONCLUSION

For the reasons stated above, the judgment of the Missouri Supreme Court should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

DONALD P. ROPER, Superintendent,
Potosi Correctional Center,

Petitioner,

v.

CHRISTOPHER SIMMONS,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

BRIEF OF THE AMERICAN MEDICAL ASSOCIATION, AMERICAN PSYCHIATRIC ASSOCIATION, AMERICAN SOCIETY FOR ADOLESCENT PSYCHIATRY, AMERICAN ACADEMY OF CHILD & ADOLESCENT PSYCHIATRY, AMERICAN ACADEMY OF PSYCHIATRY AND THE LAW, NATIONAL ASSOCIATION OF SOCIAL WORKERS, MISSOURI CHAPTER OF THE NATIONAL ASSOCIATION OF SOCIAL WORKERS, AND NATIONAL MENTAL HEALTH ASSOCIATION *AS AMICI CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Does the execution of an offender who committed the crime at the age of 16 or 17 constitute cruel and unusual punishment in violation of the Eighth Amendment?

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TABLE OF CITED AUTHORITIES

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Cases

Atkins v. Virginia,
536 U.S. 304 (2002) 3, 21-22

Bellotti v. Baird,
443 U.S. 622 (1979) 21

Eddings v. Oklahoma,
455 U.S. 104 (1982) 21

Gregg v. Georgia,
428 U.S. 153 (1976) 22

Stanford v. Kentucky,
492 U.S. 361 (1989) 9, 10

Thompson v. Oklahoma,
487 U.S. 815 (1988) 3, 10, 21, 22

Scientific Authorities

Adolphs, Ralph, *et al.*, *Fear and the Human Amygdala*, 15 J. NEUROSCIENCE 5879 (1995) 12, 15

Adolphs, Ralph, *Neural Systems for Recognizing Emotion*, 12 CURRENT OPINION IN NEUROBIOLOGY 169 (2002) 12

Adolphs, Ralph, *The Human Amygdala and Emotion*, 5 NEUROSCIENTIST 125 (1999) 15

Page

Anderson, Steve W., *et al.*, *Impairment of Social and Moral Behavior Related to Early Damage in Human Prefrontal Cortex*, 2 NATURE NEUROSCIENCE 1032 (1999) 14

Antoine, Florence, *Cooperative Group Evaluating Diagnostic Imaging Techniques*, 81 J. NAT'L CANCER INST. 1347 (1989) 10

Arnett, Jeffrey Jensen, *Adolescent Storm and Stress, Reconsidered*, 54 AM. PSYCHOLOGIST 317 (1999) 9

Arnett, Jeffrey Jensen, *Reckless Behavior in Adolescence: A Developmental Perspective*, 12 DEVELOPMENTAL REV. 339 (1992) 9

Baird, Abigail A., *et al.*, *Functional Magnetic Resonance Imaging of Facial Affect Recognition in Children and Adolescents*, 38 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 1 (1999) 13

Beauregard, Mario, *et al.*, *Neural Correlates of Conscious Self-Regulation of Emotion*, 21 J. NEUROSCIENCE 165RC (2001) 14

Bechara, Antoine, *et al.*, *Characterization of the Decision-Making Deficit of Patients with Ventromedial Prefrontal Cortex Lesions*, 123 BRAIN 2189 (2000) 14

Cited Authorities

Page

Bechara, Antoine, *et al.*, *Dissociation of Working Memory From Decision Making Within the Human Prefrontal Cortex*, 18 J. NEUROSCIENCE 428 (1998) 13

Breiter, Hans C., *et al.*, *Response and Habituation of the Human Amygdala During Visual Processing of Facial Expression*, 17 NEURON 875 (1996) 12

Casey, B.J., *et al.*, *Structural and Functional Brain Development and Its Relation to Cognitive Development*, 54 BIOLOGICAL PSYCHOLOGY 241 (2000) 13, 16, 19

Cauffman, Elizabeth & Steinberg, Laurence, *(Im)Maturity of Judgment in Adolescence: Why Adolescents May Be Less Culpable Than Adults*, 18 BEHAV. SCI. & L. 741 (2000) 6, 7, 8

Dias, R., *et al.*, *Dissociable Forms of Inhibitory Control Within Prefrontal Cortex with an Analog of the Wisconsin Card Sort Test: Restriction to Novel Situations and Independence From "On-Line" Processing*, 17 J. NEUROSCIENCE 9285 (1997) 14

Durston, Sarah, *et al.*, *Anatomical MRI of the Developing Human Brain: What Have We Learned?*, 40 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 1012 (2001) 9-10, 14, 17, 18

Cited Authorities

Page

Elliott, R., *et al.*, *Differential Neural Response to Positive and Negative Feedback in Planning and Guessing Tasks*, 35 NEUROPSYCHOLOGIA 1395 (1997) 14

Furby, Lita & Beyth-Marom, Ruth, *Risk Taking in Adolescence: A Decision-Making Perspective*, 12 DEVELOPMENTAL REV. 1 (1992) 5, 6, 8

Gardner, William & Herman, Janna, *Adolescents' AIDS Risk Taking: A Rational Choice Perspective*, 50 ADOLESCENTS IN THE AIDS EPIDEMIC 17 (1990) 5

Gardner, William, *A Life-Span Rational-Choice Theory of Risk Taking*, ADOLESCENT AND ADULT RISK TAKING: THE EIGHTH TEXAS TECH SYPOSIUM ON INTERFACES IN PSYCHOLOGY (N. Bell & R. Bell eds., 1993) 6

Gazzaniga, Michael S., *et al.*, COGNITIVE NEUROSCIENCE: THE BIOLOGY OF THE MIND (2d ed. 2002) ..... *passim*

Giedd, Jay N., *et al.*, *Brain Development During Childhood and Adolescence: A Longitudinal MRI Study*, 2 NATURE NEUROSCIENCE 861 (1999) .. 11, 16, 19, 20

Gläscher, Jan & Adolphs, Ralph, *Processing of the Arousal of Subliminal and Supraliminal Emotional Stimuli by the Human Amygdala*, 23 J. NEUROSCIENCE 10274 (2003) 12

Cited Authorities

Page

Gogtay, Nitin, *et al.*, *Dynamic Mapping of Human Cortical Development During Childhood Through Early Adulthood*, 101 PROCEEDINGS NAT'L ACAD. SCI. 8174 (2004) 10, 11, 16, 20

Goldberg, Elkhonon, THE EXECUTIVE BRAIN: FRONTAL LOBES & THE CIVILIZED MIND (2001) 12, 13, 17

Hariri, Ahmad, *et al.*, *Modulating Emotional Responses: Effects of a Neocortical Network on the Limbic System*, 11 NEUROREPORT 43 (2000) 15

Huttenlocher, Peter R., *Synaptic Density in Human Frontal Cortex: Developmental Changes and Effects of Aging*, 163 BRAIN RESEARCH 195 (1979) 19

Kandel, Denise B. & Andrews, Kenneth, *Processes of Adolescent Socialization by Parents and Peers*, 22 INT'L J. ADDICTIONS 319 (1987) 9

Kandel, Eric R., *et al.*, PRINCIPLES OF NEURAL SCI. (4th ed. 2000) 17, 18

Kennedy, David N., *et al.*, *Basic Principles of* MRI and Morphometry Studies of Human *Brain Development*, 5 DEVELOPMENTAL SCI. 268 (2002) 19

Killgore, William D.S. & Yurgelun-Todd, Deborah, *Activation of the Amygdala and Anterior Cingulate During Nonconscious Processing of Sad Versus Happy Faces*, 21 NEUROIMAGE 1215 (2004) 13

Cited Authorities

Page

LaBar, Kevin S., *et al.*, *Human Amygdala Activation During Conditioned Fear Acquisition and Extinction: A Mixed-Trial fMRI Study*, 20 NEURON 937 (1998) 12

Lane, Richard D., *et al.*, *Neuroanatomical Correlates of Pleasant and Unpleasant Emotion*, 35 NEUROPSYCHOLOGIA 1437 (1997) 12

Langleben, D.D., *et al.*, *Brain Activity During Simulated Deception: An Event-Related Functional Magnetic Resonance Study*, 15 NEUROIMAGE 727 (2002) 14

LeDoux, Joseph, THE EMOTIONAL BRAIN: THE MYSTERIOUS UNDERPINNINGS OF EMOTIONAL LIFE (1996) 15

Lewis, Dorothy Otnow, *et al.*, *Neuropsychiatric, Psychoeducational and Family Characteristics of 14 Juveniles Condemned to Death in the United States*, 145 AM. J. PSYCHIATRY 584 (1988) 21

Mallet, Chris, *Socio-Historical Analysis of Juvenile Offenders on Death Row*, 39 CRIM. L. BULL. 445 (2003) 21

Manes, Facundo, *et al.*, *Decision-Making Processes Following Damage to the Prefrontal Cortex*, 125 BRAIN 624 (2002) 13

Cited Authorities

Page

McGivern, Robert F., *et al.*, *Cognitive Efficiency on a Match to Sample Task Decreases at the Onset of Puberty in Children*, 50 BRAIN & COGNITION 73 (2002) 18, 19, 20

Moll, Jorge, *et al.*, *Frontopolar and Anterior Temporal Cortex Activation in a Moral* Judgment Task: Preliminary Functional *MRI Results in Normal Subjects*, 59 ARQ NEUROPSIQUIATR 657 (2001) ... 14

O'Doherty, J., *et al.*, *Abstract Reward and Punishment Representations in the Human Orbitofrontal Cortex*, 4 NATURE NEUROSCIENCE 95 (2001) 14

Paus, Tomas, *et al.*, *Structural Maturation of Neural Pathways in Children and Adolescents: In Vivo Study*, 283 SCI. 1908 (1999) 16, 17, 18

Pfefferbaum, Adolf, *et al.*, *A Quantitative Magnetic Resonance Imaging Study of Changes in Brain Morphology from Infancy to Late Adulthood*, 51 ARCHIVES OF NEUROLOGY 874 (1994) 17

Phan, K. Luan, *et al.*, *Functional Neuroanatomy of Emotion: A Meta-Analysis of Emotion Activation Studies in PET and fMRI*, 16 NEUROIMAGE 331 (2002) 12, 13

Rogers, Robert D., *et al.*, *Choosing Between Small, Likely Rewards and Large, Unlikely Rewards Activates Inferior and Orbital Prefrontal Cortex*, 20 J. NEUROSCIENCE 9029 (1999) 14

Cited Authorities

Page

Rubia, K., *et al.*, *Functional Frontalisation with Age: Mapping Neurodevelopmental Trajectories with fMRI*, 24 NEUROSCIENCE & BIOBEHAV. REVS.13 (2000) 15, 18

Scott, Elizabeth S., *et al.*, *Evaluating Adolescent Decision Making in Legal Contexts*, 19 LAW & HUM. BEHAV. 221 (1995) 6

Siegel, Daniel J., THE DEVELOPING MIND: TOWARD A NEUROBIOLOGY OF INTERPERSONAL EXPERIENCE (Guilford Press 1999) 12, 13, 18

Sowell, Elizabeth R., *et al.*, *Development of Cortical and Subcortical Brain Structures in Childhood and Adolescence: A Structural MRI Study*, 44 DEVELOPMENTAL MED. & CHILD NEUROLOGY 4 (2002) 10-11, 18, 19

Sowell, Elizabeth R., *et al.*, *In Vivo Evidence for Post-Adolescent Brain Maturation in Frontal and Striatal Regions*, 2 NATURE NEUROSCIENCE 859 (1999) ..... *passim*

Sowell, Elizabeth R., *et al.*, *Mapping Continued Brain Growth and Gray Matter Density Reduction in Dorsal Frontal Cortex: Inverse Relationships During Postadolescent Brain Maturation*, 21 J. NEUROSCIENCE 8819 (2001) 11, 16, 17

Sowell, Elizabeth R., *et al.*, *Mapping Cortical Change Across the Human Life Span*, 6 NATURE NEUROSCIENCE 309 (2003) 11, 16, 17, 18

Cited Authorities

Page

Spear, L.P., *The Adolescent Brain and Age-Related Behavioral Manifestations*, 24 NEUROSCIENCE & BIOBEHAV. REVS. 417 (2000) ..... *passim*

Steinberg, Laurence & Scott, Elizabeth S., *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCHOLOGIST 1009 (2003) 6, 8, 9

Steinberg, Laurence & Silverberg, Susan, *The Vicissitudes of Autonomy in Early Adolescence*, 57 CHILD DEV. 841 (1986) 9

Talukder, Gargi, *Decision-Making Is Still a Work in Progress for Teenagers*, Report dated July 2000 at www.brainconnection.com 15

Towbin, Kenneth E. & Schowalter, John E., *Adolescent Development*, PSYCHIATRY (Allan Tasman ed., 2d ed. 2003) 16, 18

Yurgelun-Todd, Deborah, *Inside the Teen Brain*, Frontline (2002) (interview) 15

INTERESTS OF *AMICI CURIAE**

The American Medical Association, the American Psychiatric Association, the American Society for Adolescent Psychiatry, the American Academy of Child & Adolescent Psychiatry, the American Academy of Psychiatry and the Law, the National Association of Social Workers, the Missouri Chapter of the National Association of Social Workers, and the National Mental Health Association file this brief as *amici curiae* in support of respondent by written consent of both parties, pursuant to Rule 37.3(a) of the Rules of this Court.

With approximately 250,000 members, the American Medical Association is the nation's largest professional organization of physicians and medical students. Founded in 1847, its purpose is to promote the science and art of medicine and the betterment of public health. The American Psychiatric Association was founded in 1844 and today has more than 35,000 member physicians who specialize in psychiatry. The American Society for Adolescent Psychiatry was founded in 1967 and today has approximately 500 members. The American Academy of Child & Adolescent Psychiatry was founded in 1953 and today has approximately 6500 child and adolescent psychiatrists and other interested physicians. The American Academy of Psychiatry and the Law, with approximately 2000 physician members, is devoted to issues at the intersection of psychiatry and the law. Established in 1955, the National Association of Social Workers (NASW) is the largest association of professional social workers in the world with 153,000 members and chapters throughout the United States, in Puerto Rico, Guam,

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* No counsel for a party authored this brief in whole or in part and no person or entity other than the *amici curiae* or their counsel made any monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of the brief of the *amici curiae*, and their letters of consent have been filed with the Clerk of the Court.

the Virgin Islands, and an International Chapter in Europe, with the purpose of developing and disseminating standards of social work practice while strengthening and unifying the social work profession as a whole. The Missouri Chapter of NASW has 2,700 members. The National Mental Health Association is the country's oldest and largest nonprofit organization addressing all aspects of mental health and mental illness since 1909. It has 340 affiliates in 43 states.

Each of the above-referenced *amici* is committed to the advancement of science. *Amici* submit this brief to describe the scientific findings of medical, psychiatric, and psychological research relevant to the legal issues under consideration.

SUMMARY OF ARGUMENT

The adolescent's mind works differently from ours. Parents know it. This Court has said it. Legislatures have presumed it for decades or more. And now, new scientific evidence sheds light on the differences.

Scientists have documented the differences along several dimensions. Adolescents as a group, even at the age of 16 or 17, are more impulsive than adults. They underestimate risks and overvalue short-term benefits. They are more susceptible to stress, more emotionally volatile, and less capable of controlling their emotions than adults.

In short, the average adolescent cannot be expected to act with the same control or foresight as a mature adult.

Behavioral scientists have observed these differences for some time. Only recently, however, have studies yielded evidence of concrete differences that are anatomically based. Cutting-edge brain imaging technology reveals that regions of the adolescent brain do not reach a fully mature state until after the age of 18. These regions are precisely those associated with impulse control, regulation of emotions, risk

assessment, and moral reasoning. Critical developmental changes in these regions occur only after late adolescence.

Science cannot, of course, gauge moral culpability. Scientists can, however, shed light on certain measurable attributes that the law has long treated as highly relevant to culpability. This Court has concluded that both adolescents who are under age 16 and mentally retarded persons exhibit characteristics — "disabilities in areas of reasoning, judgment, and control of their impulses," *Atkins v. Virginia*, 536 U.S. 304, 306 (2002) — that categorically disqualify them from the death penalty. Offenders at age 16 and 17 exhibit those characteristics as well.

ARGUMENT

SCIENCE CONFIRMS THAT ADOLESCENT OFFENDERS AT THE AGES OF 16 AND 17 EXHIBIT DEFICIENCIES THIS COURT HAS IDENTIFIED AS WARRANTING EXCLUSION FROM THE DEATH PENALTY.

This Court has held that adolescents who commit capital crimes before the age of 16 and offenders who are mentally retarded are categorically exempt from the death penalty because they exhibit "disabilities in areas of reasoning, judgment, and control of their impulses." *Atkins*, 536 U.S. at 306; *Thompson v. Oklahoma*, 487 U.S. 815 (1988). Because of these pervasive deficiencies, this Court has concluded that members of these groups "do not act with the level of moral culpability that characterizes the most serious adult criminal conduct." *Atkins*, 536 U.S. at 306.

Neither moral culpability, nor qualification for the death penalty is susceptible to scientific measurement. But the particular attributes this Court has recognized as critical to those legal judgments are scientifically identifiable. This brief focuses on what science can tell us about the neurological,

physiological, psychological, and emotional development of older adolescents from the perspective of scientists and medical professionals. Although, for convenience, this brief refers to the oldest of minors as "teens" or "adolescents," all the scientific conclusions recounted are relevant to minors who are 16 and 17 years of age.

Contrary to what some laypersons may believe, *see Amicus* Br. of the State of Alabama, *et al.* at 3, the evidence reveals that these older adolescents do not have adult levels of judgment, impulse control, or ability to assess risks. Recent advances in brain-imaging technology confirm that the very regions of their brains involved in governing these behavior-control capacities are anatomically immature. *See* Point A, *infra*.

This evidence describes the characteristics of the normal, healthy adolescent. To the extent that adolescents who commit capital offenses suffer from serious psychological disturbances that substantially exacerbate the already existing vulnerabilities of youth, they can be expected to function at sub-standard levels. *See* Point B, *infra*.

If, as this Court has observed, executing adolescents under 16 and mentally retarded offenders does not serve the death penalty's legal purposes, the same must be true of 16- and 17-year-old offenders. *See* Point C, *infra*.

A. Older Adolescents Behave Differently Than Adults Because Their Minds Operate Differently, Their Emotions Are More Volatile, and Their Brains Are Anatomically Immature.

Anyone who remembers being a teenager, who has been the parent or caretaker of a teenager, or who has observed adolescent behavior, knows intuitively that adolescents do not think or behave like adults. These behavioral differences are pervasive and scientifically documented.

Teens (including, again, the oldest of minors) are different. Their judgments, thought patterns, and emotions are different from adults', and their brains are physiologically underdeveloped in the areas that control impulses, foresee consequences, and temper emotions. They handle information processing and the management of emotions differently from adults.

1. Adolescents are inherently more prone to risk-taking behavior and less capable of resisting impulses because of cognitive and other deficiencies.

Adolescents, as a group, "are risk takers."[1] "Relative to individuals at other ages, . . . adolescents . . . exhibit a disproportionate amount of reckless behavior, sensation seeking and risk taking."[2] Risk taking of all sorts — whether drunk driving, unprotected sex, experimentation with drugs, or even criminal activity — is so pervasive that "it is statistically aberrant to refrain from such [risk-taking] behavior during adolescence."[3] In short, teenagers are prone to making bad judgments.

Cognitive experts have shown that the difference between teenage and adult behavior is not a function of the adolescent's inability to distinguish right from wrong. Nor is it a function, as early studies suggested, of an inability to conduct any cost-benefit analysis at all.[4] Rather, the difference

1. L.P. Spear, *The Adolescent Brain and Age-Related Behavioral Manifestations*, 24 NEUROSCIENCE & BIOBEHAV. REVS. 417, 421 (2000); *see also* William Gardner & Janna Herman, *Adolescents' AIDS Risk Taking: A Rational Choice Perspective*, 50 ADOLESCENTS IN THE AIDS EPIDEMIC 17 (1990).

2. Spear, *supra* note 1, at 421.

3. *Id.*

4. *See* Lita Furby & Ruth Beyth-Marom, *Risk Taking in Adolescence: A Decision-Making Perspective*, 12 DEVELOPMENTAL (Cont'd)

lies in what scientists have characterized as "deficiencies in the way adolescents think,"[5] an inability to perceive and weigh risks and benefits *accurately*.[6] "[B]ecause of developmental influences," teens "differ from adults in the subjective value[s] that they attach to various perceived consequences in the process of making choices."[7] They focus more on opportunities for gains and less on protection against losses.[8] They put greater emphasis on short-term consequences than adults and discount future consequences more than adults.[9] It is not that adolescents do not perform cost-benefit analyses; rather, they skew the balancing, resulting in poor judgments.

(Cont'd)

REV. 1, 9-11 (1992); *see also* William Gardner, *A Life-Span Rational-Choice Theory of Risk Taking*, ADOLESCENT AND ADULT RISK TAKING: THE EIGHTH TEXAS TECH SYMPOSIUM ON INTERPACES IN PSYCHOLOGY at 66, 69 (N. Bell & R. Bell eds., 1993).

5. Elizabeth Cauffman & Laurence Steinberg, *(Im)Maturity of Judgment in Adolescence: Why Adolescents May Be Less Culpable Than Adults*, 18 BEHAV. SCI. & L. 741, 742 (2000); *see also* Gardner (1993), *supra* note 4, at 67.

6. *See* Furby, *supra* note 4, at 17; *see also* Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCHOLOGIST 1009, 1012 (2003). For this reason, Missouri's contention that Christopher Simmons was able to perform some kind of cost-benefit analysis when he committed his crime, Petitioner's Br. at 35, may be technically correct, but it fails to acknowledge that neither Simmons, nor adolescents generally, can be expected to perform such an analysis the *way* adults do.

7. *See* Elizabeth S. Scott *et al.*, *Evaluating Adolescent Decision Making in Legal Contexts*, 19 LAW & HUM. BEHAV. 221, 233 (1995).

8. *See id.* at 231.

9. *See id.*

Adolescents' cognitive deficiencies are compounded by "deficiencies in adolescents' social and emotional capability."[10] One group of psychosocial researchers gauging these factors, along with cognitive development, "maturity of judgment," or "psychological maturity," as compared to adults', has been able to draw conclusions about the adolescent in three respects: "responsibility" (including factors such as self-reliance and independence); "perspective" (which covers the capacity to "consider[] situations from different viewpoints"); and "temperance" (encompassing the ability "to limit impulsivity").[11] Thus, "observed differences in risky decision-making between adolescents and adults" reflect "differences in capabilities, and not simply priorities."[12]

This study, based on a sample of more than 1,000 adolescents and adults, established that psychosocial maturity is incomplete until age 19, at which point it plateaus.[13] Adolescents "score lower on measures of self-reliance and other aspects of personal responsibility, they have more difficulty seeing things in long-term perspective, they are less likely to look at things from the perspective of others, and they have more difficulty restraining their aggressive impulses."[14] Perspective and temperance, in particular, do not mature until late in adolescence.[15]

Researchers have found that the deficiencies in the adolescent mind and emotional and social development are

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10. Cauffman, *supra* note 5, at 743.

11. *Id.* at 745.

12. *Id.* at 744.

13. *See id.* at 756.

14. *Id.* at 759.

15. *See id.* at 756.

especially pronounced when other factors — such as stress, emotions, and peer pressure — enter the equation. These factors affect everyone's cognitive functioning, but they operate on the adolescent mind differently and with special force.

The interplay among stress, emotion, and cognition in teenagers is particularly complex — and different from adults. Stress affects cognitive abilities, including the ability to weigh costs and benefits and to override impulses with rational thought.[16] But adolescents are more susceptible to stress from daily events than adults, which translates into a further distortion of the already skewed cost-benefit analysis.[17]

Emotion, like stress, also plays an important role in cognition, influencing decision-making and risk-taking behavior.[18] Because of both greater stress and more drastic hormonal fluctuations, adolescents are more emotionally volatile than adults — or children, for that matter.[19] They tend to experience emotional states that are more extreme and more variable than those experienced by adults.[20]

The typical adolescent is also more vulnerable to peer pressure than an adult. "Social interactions and affiliation with peers take on particular importance during ... adolescence."[21] Adolescents spend twice as much time with peers as with parents or other adults.[22] The pronounced

16. *See* Spear, *supra* note 1, at 423; Furby, *supra* note 4, at 22.

17. *See* Spear, *supra* note 1, at 423; Furby, *supra* note 4, at 22.

18. *See* Steinberg, *supra* note 6, at 1011-13.

19. *See* Spear, *supra* note 1, at 429.

20. *See id.* at 429; Cauffman, *supra* note 5, at 757.

21. Spear, *supra* note 1, at 420.

22. *See id.*

importance of approval and acceptance by friends will make an already risk-prone or impulsive adolescent even more so.[23] Adolescents not only are more susceptible to peer pressure, but they gravitate toward peers who reinforce their own predilections. In other words, a risk-prone and impulsive teen will have a comparatively high propensity to gravitate toward others who reinforce that behavior.[24] Unsurprisingly, an adolescent who spends time with risk-prone friends is more likely to "engag[e] in risky behavior."[25]

In sum, the conclusion of the scientific research is that, for a variety of interrelated reasons, adolescents as a group are less able than adults to moderate risky behavior or control impulses.

2. Brain studies establish an anatomical basis for adolescent behavior.

Modern brain research technologies developed a body of data in the late 1990s — well after this Court decided *Stanford v. Kentucky*, 492 U.S. 361 (1989) — that provides a compelling picture of the inner workings of the adolescent brain.[26]

23. *See* Steinberg, *supra* note 6, at 1012; *see also* Laurence Steinberg & Susan Silverberg, *The Vicissitudes of Autonomy in Early Adolescence*, 57 CHILD DEV. 841, 845 (1986).

24. *See generally* Jeffrey Jensen Arnett, *Reckless Behavior in Adolescence: A Developmental Perspective*, 12 DEVELOPMENTAL REV. 339, 354-55 (1992).

25. Denise B. Kandel & Kenneth Andrews, *Processes of Adolescent Socialization by Parents and Peers*, 22 INT'L J. ADDICTIONS 319, 334-335 (1987); *see also* Jeffrey Jensen Arnett, *Adolescent Storm and Stress, Reconsidered*, 54 AM. PSYCHOLOGIST 317, 321 (1999) ("Unlike conflict with parents or mood disruptions, rates of risk behavior peak in late adolescence/emerging adulthood rather than early or middle adolescence.")

26. *See* Sarah Durston *et al.*, *Anatomical MRI of the Developing Human Brain: What Have We Learned?*, 40 J. AM. ACAD. CHILD & (Cont'd)

Adolescents' behavioral immaturity mirrors the anatomical immaturity of their brains.[27] To a degree never before understood, scientists can now demonstrate that adolescents are immature not only to the observer's naked eye, but in the very fibers of their brains.

This insight emerges from sophisticated and non-invasive brain imaging techniques, performed by high-resolution structural and functional magnetic resonance imaging ("MRI") and other technologies.[28] These imaging techniques are a quantum leap beyond previous mechanisms for assessing brain development. Before the rise of neuroimaging, the understanding of brain development in the days of *Thompson* and *Stanford* was gleaned largely from post-mortem examinations,[29] which shed little light on how a live brain operates and how a particular brain develops over time, or "longitudinally."[30] Brain imaging,

(Cont'd)

ADOLESCENT PSYCHIATRY 1012, 1012 (2001) (reviewing results of MRI studies of brain development in childhood and adolescence); Michael S. Gazzaniga *et al.*, COGNITIVE NEUROSCIENCE: THE BIOLOGY OF THE MIND at 20-21, 138 (2d ed. 2002).

27. *See* Nitin Gogtay *et al.*, *Dynamic Mapping of Human Cortical Development During Childhood Through Early Adulthood*, 101 PROCEEDINGS NAT'L ACAD. SCI. 8174, 8177 (2004).

28. "MRI measures the response of atoms in different tissues when they are pulsed with radio waves that are under the influence of magnetic fields thousands of times the strength of the earth's. Each type of tissue responds differently, emitting characteristic signals from the nuclei of its cells. The signals are fed into a computer, the position of those atoms is recorded, and a composite picture of the body area being examined is generated and studied in depth." Florence Antoine, *Cooperative Group Evaluating Diagnostic Imaging Techniques*, 81 J. NAT'L CANCER INST. 1347, 1348 (1989).

29. *See* Gazzaniga, *supra* note 26, at 63.

30. *See generally* Elizabeth R. Sowell *et al.*, *Development of Cortical and Subcortical Brain Structures in Childhood and*

(Cont'd)

in contrast, allows researchers to study how a live brain progresses longitudinally.

Technological breakthroughs have not only enabled scientists to confirm some of what was previously known or believed, but they have provided new evidence that has changed the way scientists understand the development of the human brain as it progresses from childhood through adolescence and into adulthood.[31] "Structural brain imaging studies in normal children and adolescents have been helpful in relating the dramatic maturation of cognitive, emotional, and social functions with the brain structures that ultimately underlie them."[32]

In this regard, two complementary observations have been especially revealing. First, adolescents rely for certain tasks, more than adults, on the amygdala, the area of the brain associated with primitive impulses of aggression, anger, and fear. Adults, on the other hand, tend to process similar information through the frontal cortex, a cerebral area associated with impulse control and good judgment. Second, the regions of the brain associated with impulse control, risk assessment, and moral reasoning develop last, after late adolescence.

(Cont'd)

Adolescence: A Structural MRI Study, 44 DEVELOPMENTAL MED. & CHILD NEUROLOGY 4 (2002); Elizabeth R. Sowell *et al.*, *Mapping Continued Brain Growth and Gray Matter Density Reduction in Dorsal Frontal Cortex: Inverse Relationships During Postadolescent Brain Maturation*, 21 J. NEUROSCIENCE 8819 (2001).

31. *See* Elizabeth R. Sowell *et al.*, *In Vivo Evidence for Post-Adolescent Brain Maturation in Frontal and Striatal Regions*, 2 NATURE NEUROSCIENCE 859 (1999); *see also* Jay N. Giedd *et al.*, *Brain Development During Childhood and Adolescence: A Longitudinal MRI Study*, 2 NATURE NEUROSCIENCE 861 (1999).

32. Elizabeth R. Sowell *et al.*, *Mapping Cortical Change Across the Human Life Span*, 6 NATURE NEUROSCIENCE 309 (2003); *see also* Gogtay, *supra* note 27, at 8177.

a. Research shows that adolescent brains are more active in regions related to aggression, anger, and fear, and less active in regions related to impulse control, risk assessment, and moral reasoning than adult brains.

The brain is a complex network of interrelated parts. Each part is associated with different functions and capabilities. The regions relevant to understanding the adolescent behaviors discussed in the previous section are the areas of the brain associated with (1) emotional impulses, particularly aggression; and (2) impulse control, risk assessment, and moral reasoning.

The emotional center of the brain is the limbic system.[33] Within the limbic system is the amygdala, which is associated with aggressive and impulsive behavior.[34] The amygdala is "a neural system that evolved to detect danger and produce

33. *See generally* Daniel J. Siegel, THE DEVELOPING MIND: TOWARD A NEUROBIOLOGY OF INTERPERSONAL EXPERIENCE at 10-11 (Guilford Press 1999).

34. *See generally* Jan Gläscher & Ralph Adolphs, *Processing of the Arousal of Subliminal and Supraliminal Emotional Stimuli by the Human Amygdala*, 23 J. NEUROSCIENCE 10274 (2003); Ralph Adolphs, *Neural Systems for Recognizing Emotion*, 12 CURRENT OPINION IN NEUROBIOLOGY 169 (2002); Gazzaniga, *supra* note 26, at 553-572; K. Luan Phan *et al.*, *Functional Neuroanatomy of Emotion: A Meta-Analysis of Emotion Activation Studies in PET and fMRI*, 16 NEUROIMAGE 331, 336 (2002); Elkhonon Goldberg, THE EXECUTIVE BRAIN: FRONTAL LOBES & THE CIVILIZED MIND at 31 (2001); Kevin S. LaBar *et al.*, *Human Amygdala Activation During Conditioned Fear Acquisition and Extinction: A Mixed-Trial fMRI Study*, 20 NEURON 937 (1998); Richard D. Lane, *et al.*, *Neuroanatomical Correlates of Pleasant and Unpleasant Emotion*, 35 NEUROPSYCHOLOGIA 1437, 1441 (1997); Hans C. Breiter *et al.*, *Response and Habituation of the Human Amygdala During Visual Processing of Facial Expression*, 17 NEURON 875 (1996); Ralph Adolphs *et al.*, *Fear and the Human Amygdala*, 15 J. NEUROSCIENCE 5879, 5889 (1995).

rapid protective responses without conscious participation."[35] It dictates instinctive gut reactions, including fight or flight responses.[36]

When it comes to "response inhibition, emotional regulation, planning and organization," the so-called executive functions, the most important components of the brain are the frontal lobes.[37] In particular, "the neocortex at the top of the brain[] mediate[s] 'more complex' information-processing functions such as perception, thinking, and reasoning,"[38] and the prefrontal cortex is associated with a variety of cognitive abilities,[39] including decision making,[40] risk assessment,[41] ability to judge future

35. Abigail A. Baird *et al.*, *Functional Magnetic Resonance Imaging of Facial Affect Recognition in Children and Adolescents*, 38 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 1, 1 (1999) (study found that adolescents 12-17 years old showed significant amygdala activation in response to a task that required the judgment of fearful facial affect); *see also* William D.S. Killgore & Deborah Yurgelun-Todd, *Activation of the Amygdala and Anterior Cingulate During Nonconscious Processing of Sad Versus Happy Faces*, 21 NEUROIMAGE 1215 (2004); Phan, *supra* note 34, at 336.

36. *See* Goldberg, *supra* note 34, at 31; Phan, *supra* note 34, at 336.

37. Sowell (1999), *supra* note 31, at 860; *see also* Gazzaniga, *supra* note 26, at 75, 547.

38. Siegel, *supra* note 33, at 10.

39. *See* B.J. Casey *et al.*, *Structural and Functional Brain Development and Its Relation to Cognitive Development*, 54 BIOLOGICAL PSYCHOLOGY 241, 244 (2000).

40. *See* Antoine Bechara *et al.*, *Dissociation of Working Memory From Decision Making Within the Human Prefrontal Cortex*, 18 J. NEUROSCIENCE 428 (1998).

41. *See* Facundo Manes *et al.*, *Decision-Making Processes Following Damage to the Prefrontal Cortex*, 125 BRAIN 624 (2002).

consequences,[42] evaluating reward and punishment,[43] behavioral inhibition,[44] impulse control,[45] deception,[46] responses to positive and negative feedback,[47] and making moral judgments.[48]

The frontal lobe modulates synaptic transmissions from the amygdala[49] to which it is strongly connected.[50] A still-

42. *See* Antoine Bechara *et al.*, *Characterization of the Decision-Making Deficit of Patients with Ventromedial Prefrontal Cortex Lesions*, 123 BRAIN 2189 (2000).

43. *See* J. O'Doherty *et al.*, *Abstract Reward and Punishment Representations in the Human Orbitofrontal Cortex*, 4 NATURE NEUROSCIENCE 95 (2001); Robert D. Rogers *et al.*, *Choosing Between Small, Likely Rewards and Large, Unlikely Rewards Activates Inferior and Orbital Prefrontal Cortex*, 20 J. NEUROSCIENCE 9029 (1999).

44. *See* R. Dias *et al.*, *Dissociable Forms of Inhibitory Control Within Prefrontal Cortex with an Analog of the Wisconsin Card Sort Test: Restriction to Novel Situations and Independence From "On-Line" Processing*, 17 J. NEUROSCIENCE 9285 (1997); Durston, *supra* note 26, at 1016.

45. *See* Bechara (2000), *supra* note 42, at 2198-99.

46. *See* D.D. Langleben *et al.*, *Brain Activity During Simulated Deception: An Event-Related Functional Magnetic Resonance Study*, 15 NEUROIMAGE 727 (2002).

47. *See* R. Elliott *et al.*, *Differential Neural Response to Positive and Negative Feedback in Planning and Guessing Tasks*, 35 NEUROPSYCHOLOGIA 1395 (1997).

48. *See* Jorge Moll *et al.*, *Frontopolar and Anterior Temporal Cortex Activation in a Moral Judgment Task: Preliminary Functional MRI Results in Normal Subjects*, 59 ARQ NEUROPSIQUIATR 657 (2001); Steve W. Anderson *et al.*, *Impairment of Social and Moral Behavior Related to Early Damage in Human Prefrontal Cortex*, 2 NATURE NEUROSCIENCE 1032 (1999).

49. *See* Mario Beauregard, *et al.*, *Neural Correlates of Conscious Self-Regulation of Emotion*, 21 J. NEUROSCIENCE 165RC (2001); (Cont'd)

maturing frontal lobe exerts less control over the amygdala and has less influence over behavior and emotions than a fully mature frontal lobe.[51] In other words, if the frontal lobe is immature or underdeveloped, there is less of a check on the amygdala.

New research suggests that the limbic system is more active in adolescent brains than adult brains, particularly in the region of the amygdala[52] and that the frontal lobes of the adolescent brain are less active.[53] More generally, as teenagers grow into adults, they increasingly shift the overall focus of brain activity to the frontal lobes.[54]

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Ahmad Hariri, *et al.*, *Modulating Emotional Responses: Effects of a Neocortical Network on the Limbic System*, 11 NEUROREPORT 43 (2000).

50. Ralph Adolphs, *The Human Amygdala and Emotion*, 5 NEUROSCIENTIST 125, 125-26 (1999); *see also* Joseph LeDoux, THE EMOTIONAL BRAIN: THE MYSTERIOUS UNDERPINNINGS OF EMOTIONAL LIFE at 303 (1996).

51. *See* Gargi Talukder, *Decision-Making Is Still a Work in Progress for Teenagers*, Report dated July 2000 at www.brainconnection.com; *see also* Spear, *supra* note 1, at 440 (reporting Dr. Yurgelun-Todd's research); *see also* Adolphs (1995), *supra* note 34, at 5889.

52. *See* Deborah Yurgelun-Todd, *Inside the Teen Brain*, Frontline (2002) (interview); *see also* K. Rubia, *et al.*, *Functional Frontalisation with Age: Mapping Neurodevelopmental Trajectories with fMRI*, 24 NEUROSCIENCE & BIOBEHAV. REVS. 13 (2000).

53. *See* Yurgelun-Todd, *supra* note 52; *See also* Rubia, *supra* note 52, at 18.

54. *See* K. Rubia, *supra* note 52, at 18; *see also* Spear, *supra* note 1, at 440; Yurgelun-Todd (2002), *supra* note 52.

b. Adolescent brains are not fully developed in regions related to reasoning, risk taking, and impulse control.

Even more groundbreaking than the evidence of brain activity is the recent revelation, confirmed through brain imaging studies, that the brain's frontal lobes are still structurally immature well into late adolescence.[55] The prefrontal cortex (which, as noted above, is most associated with impulse control, risk assessment, and moral reasoning) is "one of the last brain regions to mature."[56] This, in turn, means that "response inhibition, emotional regulation, planning and organization . . . continue to develop between adolescence and young adulthood."[57] As one prominent neurophysiologist put it, "[s]tructural maturation of individual brain regions and their connecting pathways is a condition *sine qua non* for the successful development of cognitive . . . functions."[58]

55. *See* Gogtay, *supra* note 27, at 8174 (subjects of study aged 4 to 21 years); Giedd, *supra* note 31, at 861 (subjects of study aged 4.2 to 21.6 years); Sowell (1999), *supra* note 31, at 860-61 (subjects of study aged 12 to 16 and 23 to 30 years); *see also* Sowell (2001), *supra* note 30, at 8026 (noting pronounced brain maturational processes continuing into post-adolescence; subjects of study aged 7 to 30 years); Sowell (2003), *supra* note 32, at 309 (subjects of study aged 7 to 87 years).

56. Casey, *supra* note 39, at 243; *see also* Gogtay, *supra* note 27, at 8175.

57. Sowell (1999), *supra* note 31, at 860; *see also* Kenneth E. Towbin & John E. Schowalter, *Adolescent Development*, PSYCHIATRY at 145, 151-52 (Allan Tasman ed., 2d ed. 2003). This paper recognizes the link between "improvement during adolescence in specific cognitive skills such as organizing information, conceptualization, perspective taking, and social perception, to structural changes in frontal cortical and sub-cortical structures." *Id.* at 152.

58. Tomas Paus *et al.*, *Structural Maturation of Neural Pathways in Children and Adolescents: In Vivo Study*, 283 SCI. 1908 (1999) (subjects of study aged 4 to 17 years).

The adolescent's frontal lobes are underdeveloped in two distinct ways, each of which directly affects brain functioning. First, myelination is incomplete. Second, pruning is incomplete. We discuss each in turn.

Myelination. An important measure of brain maturity is myelination.[59] Myelination is the process by which the brain's axons are coated with a fatty white substance called myelin. Myelin surrounds the axons, which are neural fibers that use electrical impulses to carry information across long distances, and insulates the pathway, speeding the neural signal along the pathway.[60] "The presence of myelin makes communication between different parts of the brain faster and more reliable."[61] Myelination of "white matter"[62] continues through adolescence and into adulthood.[63]

59. *See* Goldberg, *supra* note 34, at 144; *see also* Sowell (2001), *supra* note 30, at 8819; Sowell (2003), *supra* note 32, at 311.

60. *See* Gazzaniga, *supra* note 26, at 31, 48-49; Eric R. Kandel, *et al.*, PRINCIPLES OF NEURAL SCI. at 22, 85 (4th ed. 2000).

61. Goldberg, *supra* note 34, at 144.

62. White matter is the tissue that composes the pathways between brain regions that permits communication and interaction within the brain and between the brain and the body. *See* Gazzaniga, *supra* note 26, at 70, 72. For example, the corpus callosum, a critical white matter structure, bridges the two halves of the frontal lobes, permitting and regulating communication between the two halves of the brain. *See* Paus, *supra* note 58, at 1908.

63. *See* Durston, *supra* note 26, at 1014; Sowell (1999), *supra* note 31, at 860; Adolf Pfefferbaum *et al.*, *A Quantitative Magnetic Resonance Imaging Study of Changes in Brain Morphology from Infancy to Late Adulthood*, 51 ARCHIVES OF NEUROLOGY 874, 885 (1994) (after age 20 white matter volume did not fluctuate until about age 70; subjects of study aged 3 months to 70 years).

As measured by myelination, different parts of the brain mature at different rates.[64] The new brain imaging data, supported by data gathered through the older autopsy technique,[65] provides credible evidence that the frontal lobes, which are still developing well into adolescence and beyond, are among the last portions of the brain to mature.[66] In other words, the region of the brain associated with impulse control, risk assessment, and moral reasoning is the last to form, and is not complete until late adolescence or beyond.

Pruning. Gray matter, which comprises the outer surfaces, or cortices, of the brain, is composed of the brain cells (or neurons)[67] that perform the brain's tasks, such as the cognition and higher functions that are carried out in the frontal lobes.[68] Like myelination, changes in gray matter are important indications of brain maturity. As the brain matures, gray matter *decreases*[69] through a process called pruning. Just as the pruning of a rose bush strengthens the remaining branches, the pruning of gray matter improves the functioning of the brain's reasoning centers.[70] Brain cells that are not used shrivel off,[71] thereby increasing the efficiency of the

64. *See* Sowell (2003), *supra* note 32, at 311; Sowell (2002), *supra* note 30, at 4; Towbin & Schowalter, *supra* note 57, at 151.

65. *See* Paus, *supra* note 58, at 1908.

66. *See* Sowell (1999), *supra* note 31, at 859; Rubia, *supra* note 52, at 13 (subjects of study aged 12 to 19 and 22 to 40 years).

67. *See* Gazzaniga, *supra* note 26, at 64-65.

68. *See* E. Kandel, *supra* note 60, at 9.

69. *See* Durston, *supra* note 26, at 1014.

70. *See* Robert F. McGivern *et al.*, *Cognitive Efficiency on a Match to Sample Task Decreases at the Onset of Puberty in Children*, 50 BRAIN & COGNITION 73 (2002) (subjects of study aged 10 to 22 years).

71. *See* Siegel, *supra* note 33, at 13-14.

neural system.[72] Thus, pruning establishes some pathways and extinguishes others, enhancing brain functioning.

Scientists have known about pruning for over 20 years,[73] but modern brain imaging technology has provided insights into the process of pruning.[74] Until MRI technology emerged, the common wisdom was that the volume of gray matter spurted only once, shortly after birth, and then declined gradually over time. Brain scans have revealed a more complicated reality: In particular regions of the brain, gray matter blossoms once again later in childhood.[75] The frontal

72. *See* Casey, *supra* note 39, at 241 ("findings are consistent with the view that increasing cognitive capacity during childhood coincides with a gradual loss rather than formation of new synapses and presumably a strengthening of remaining synaptic connections.").

73. *See generally* Peter R. Huttenlocher, *Synaptic Density in Human Frontal Cortex: Developmental Changes and Effects of Aging*, 163 BRAIN RESEARCH 195 (1979).

74. *See, e.g.*, Sowell (2002), *supra* note 30, at 4.

75. *See* McGivern, *supra* note 70, at 85; *see also* David N. Kennedy *et al.*, *Basic Principles of MRI and Morphometry Studies of Human Brain Development*, 5 DEVELOPMENTAL SCI. 268, 274 (2002)

> Studies showed linear increases in white matter in the age range of 4-20 years. They were also able to demonstrate nonlinear changes in cortical gray matter, summarized as a preadolescent increase followed by a postadolescent decrease. Further localization of these changes indicated that the frontal and parietal lobe peaked at about age 12, the temporal lobe at about age 16, and the occipital lobe continued its increase through age 20, although the confidence intervals on these observations are large.

Giedd, *supra* note 31, at 861.

lobe is one of the places where gray matter increases — before adolescence — and then gets pruned over time, beyond adolescence.[76] As is true of myelination, the frontal lobes are the last regions where pruning is complete.[77] That means pruning is occurring last in the areas related to impulse control, risk-taking, and self-control. One of the last areas of the brain to reach full maturity, as measured by pruning, is the part associated with regulating behavior, stifling impulses, assessing risks, and moral reasoning.[78]

B. To the Extent That Adolescents Who Commit Capital Offenses Suffer From Serious Psychological Disturbances That Substantially Exacerbate the Already Existing Vulnerabilities of Youth, They Can Be Expected to Function at Sub-Standard Levels.

The evidence summarized to this point, based upon studies of normal adolescents, leads to the conclusion that normal adolescents cannot be expected to operate with the level of maturity, judgment, risk aversion, or impulse control of an adult. Adolescents cannot be expected to transcend their own psychological or biological capacities. However, an adolescent who has suffered brain trauma, a dysfunctional family life, violence, or abuse cannot be presumed to operate even at standard levels for adolescents.

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76. *See* Giedd, *supra* note 31, at 861; McGivern, *supra* note 70, at 85.

77. A very recent article published by the National Academy of Sciences measured gray matter density in individuals longitudinally from childhood to early adulthood and concluded that "the [gray matter] maturation ultimately involves the dorsolateral prefrontal cortex, which loses [gray matter] only at the end of adolescence." Gogtay, *supra* note 27, at 8175.

78. *See id.* at 8177 ("Later to mature were areas involved in executive function, attention, and motor coordination (frontal lobes).").

There is good reason to believe that the population of adolescents who end up on death row are more likely to have suffered any or all of these disturbances.[79] To the extent that this is true, the population of adolescent offenders on death row is likely to be exceptionally immature as a matter of cognitive development, psychosocial development, anatomical development, or all three.

C. Executing Adolescents Does Not Serve the Recognized Purposes of the Death Penalty.

This Court has never required mountains of data to appreciate that "youth is more than a chronological fact. . . . It is a time and condition of life when a person may be most susceptible to influence and to psychological damage." *Eddings v. Oklahoma*, 455 U.S. 104, 115-16 (1982) (quoting *Bellotti v. Baird*, 443 U.S. 622, 635 (1979)). The foregoing data do, however, show that older adolescents are not simply miniature adults, with less experience or wisdom. They are also not as equipped as adults to engage in moral reasoning and adjust their conduct accordingly.

These neurological, physiological, and psychological deficits are exactly the characteristics that this Court has identified as warranting a categorical exemption from the death penalty.

If offenders with mental retardation are less culpable because their underdeveloped brains leave them with "diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to

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79. *See, e.g.*, Chris Mallet, *Socio-Historical Analysis of Juvenile Offenders on Death Row*, 39 CRIM. L. BULL. 445, 457-60 (2003); *Thompson*, 487 U.S. at 835 note 42 (plurality) (citing Dorothy Otnow Lewis, *et al.*, *Neuropsychiatric, Psychoeducational and Family Characteristics of 14 Juveniles Condemned to Death in the United States*, 145 AM. J. PSYCHIATRY 584 (1988)).

control impulses, and to understand the reactions of others," *Atkins*, 536 U.S. at 318, then the same must also be true of older adolescents. So too, if younger adolescents are less culpable because of their inexperience, emotionality, susceptibility to peer pressure, and impulsivity, *Thompson*, 487 U.S. at 834, the same must again be true of older adolescents. They, too, are limited by the capacities of their "equipment" as are mentally retarded offenders. The greater predilection for high-risk behavior, the emotional volatility that clouds judgment, and the underdeveloped impulse control are pervasive among adolescents, just as they are among mentally retarded individuals.

The difference is that youth is temporary. Adolescents, with immature brains, emergent coping skills, and diminished judgment capacity, eventually become adults who can and should be held fully accountable for their actions. In the meantime, however, to execute 16- and 17-year-old offenders is to presume full adult responsibility and to hold them accountable not just for their acts, but also for the immaturity of their neural anatomy and psychological development.

This Court has held that executing a mentally retarded offender is unlikely to "affect the 'cold calculus that precedes the decision' of other potential murderers." *Atkins*, 536 U.S. at 319 (quoting *Gregg v. Georgia*, 428 U.S. 153, 186 (1976)). The same is true of older adolescents whose "calculus" weighs inputs—particularly, future consequences—differently from adults, and far differently from the cold-blooded adult murderer for whom the death penalty is reserved. *Id.* at 320; *see id.* at 319.

As long as this Court adheres to the view that an underdeveloped brain combined with heightened emotionality, an immature ability to anticipate long-term consequences, and susceptibility to peer pressure, justifies categorically excluding younger adolescents and mentally

retarded offenders from the death penalty, the medical evidence should lead the Court to accord the same treatment to adolescents at the age of 16 or 17.

CONCLUSION

Sixteen- and 17-year-old offenders possess the same characteristics that warranted excluding offenders under 16 and mentally retarded persons from the reach of the death penalty, and on that basis they should also be excluded.

Respectfully submitted,

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Petitioner

v.

CHRISTOPHER SIMMONS

On Writ Of Certiorari To The Supreme Court Of Missouri

BRIEF FOR THE AMERICAN PSYCHOLOGICAL ASSOCIATION, AND THE MISSOURI PSYCHOLOGICAL ASSOCIATION AS *AMICI CURIAE* SUPPORTING RESPONDENT

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Tex. Crim. Proc. Code Ann. § 37.071(2) 17

Va. Code Ann. § 19.2-264.2(1) 17

Sup. Ct. R. 37.3(a) 1

MISCELLANEOUS:

American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* 702 (4th ed. text rev. 2000) 19

Michael E. Antonio et al., *Capital Jurors as the Litmus Test of Community Conscience for the Juvenile Death Penalty*, 87 Judicature 275 (2004) 25

Jeffrey Arnett, *Reckless Behavior in Adolescence: A Developmental Perspective*, 12 Developmental Rev. 339 (1992) 5

Jeffrey Jensen Arnett, *Emerging Adulthood: A Theory of Development from the Late Teens Through the Twenties*, 55 Am. Psychologist 469 (2000) 4

Donna Bishop & Charles Frazier, *Consequences of Transfer, in The Changing Borders of Juvenile Justice: Transfer of Adolescents to the Criminal Court* 227 (Jeffrey Fagan & Franklin E. Zimring eds., 2000) 25

TABLE OF AUTHORITIES – Continued

Page

John H. Blume et al., *Future Dangerousness in Capital Cases: Always "At Issue,"* 86 Cornell L. Rev. 397 (2001) 18

William J. Bowers et al., *The Capital Sentencing Decision: Guided Discretion, Reasoned Moral Judgment, or Legal Fiction, in America's Experience with Capital Punishment* 413 (James R. Acker et al. eds., 2d ed. 2003) 18

George S. Bridges & Sara Steen, *Racial Disparities in Official Assessments of Juvenile Offenders: Attributional Stereotypes as Mediating Mechanisms*, 63 Am. Soc. Rev. 554 (1998) 27

Elizabeth Cauffman & Laurence Steinberg, *(Im)maturity and Judgment in Adolescence: Why Adolescents May be Less Culpable Than Adults*, 18 Behav. Sci. & L. 741 (2000) 7

Centers for Disease Control and Prevention, *Deaths: Leading Causes for 2001*, Nat'l Vital Stat. Rep. No. 52-9, Nov. 7, 2003 5

Hervey Cleckley, *The Mask of Sanity* 270 (5th ed. 1976) 21

Antonio R. Damasio & Steven W. Anderson, *The Frontal Lobes, in Clinical Neuropsychology* 404 (Kenneth M. Heilman & Edward Valenstein eds., 4th ed. 2003) 10

Death Penalty Information Center, Execution Database, *at* http://www.deathpenaltyinfo.org/executions.php 27

TABLE OF AUTHORITIES – Continued

Page

Death Penalty Information Center, Juveniles Executed in the Modern Era, *at* http://www.deathpenaltyinfo.org/article.php?scid=27&did= 203 .... 18, 27

Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. Rev. 891, 944 (2004) 28

John F. Edens et al., *Assessment of "Juvenile* Psychopathy" *and Its Association with Violence: A Critical Review*, 19 Behav. Sci. & L. 53 (2001) 23

John F. Edens et al., *Psychopathic Traits Predict Attitudes Toward a Juvenile Capital Murderer*, 21 Behav. Sci. & L. 807 (2003) 21

Theodore Eisenberg & Martin T. Wells, *Deadly Confusion: Juror Instructions in Capital Cases*, 79 Cornell L. Rev. 1 (1993) 19

Jeffrey Fagan, *Separating the Men From the Boys: The Comparative Advantage of Juvenile Versus Criminal Court Sanctions on Recidivism Among Adolescent Felony Offenders, in Sourcebook on Serious, Violent & Chronic Juvenile Offenders* 238 (James C. Howell et al. eds., 1995) 14

Adelle E. Forth et al., *Hare Psychopathy Checklist: Youth Version* (2003) 22

Adelle E. Forth & Heather C. Burke, *Psychopathy in Adolescence: Assessment, Violence, and Developmental Precursors, in Psychopathy: Theory, Research and Implications for Society* 205 (1994) 22

Paul J. Frick et al., *The 4 Year Stability of Psychopathic Traits in Non-Referred Youth*, 21 Behav. Sci. & L. 713 (2003) 23

TABLE OF AUTHORITIES – Continued

Page

Lita Furby & Ruth Beyth-Marom, *Risk Taking in Adolescence: A Decision-Making Perspective*, 12 Developmental Rev. 1 (1992) 8

Carl B. Gacono et al., *Treating Conduct Disorder, Antisocial, and Psychopathic Personalities, in Treating Adult and Juvenile Offenders with Special Needs* 99 (Jose B. Ashford et al. eds., 1997) 20

Jay N. Giedd et al., *Brain Development During Childhood and Adolescence: A Longitudinal MRI Study*, 2 Nature Neuroscience 861 (1999) 9

Peggy C. Giordano et al., *Changes in Friendship Relations Over the Life Course: Implications for Desistance from Crime*, 41 Criminology 293 (2003) 8

Nitin Gogtay et al., *Dynamic Mapping of Human Cortical Development During Childhood Through Early Adulthood*, 101 Proc. Nat'l Acad. Sci. 8174 (2004) 10

Elkhonon Goldberg, *The Executive Brain: Frontal Lobes and the Civilized Mind* (2001) 10

Sandra Graham & Brian S. Lowery, *Priming Unconscious Racial Stereotypes About Adolescent Offenders*, L. & Hum. Behav. (forthcoming 2004) 26

Thomas Grisso, *Double Jeopardy: Adolescent Offenders with Mental Disorders* (2004) 24

Thomas Grisso et al., *Juveniles' Competence to Stand Trial: A Comparison of Adolescents' and Adults' Capacities as Trial Defendants*, 27 L. & Hum. Behav. 333 (2003) 29, 30

TABLE OF AUTHORITIES – Continued

Page

Bonnie L. Halpern-Felsher & Elizabeth Cauffman, *Costs and Benefits of a Decision: Decision-Making Competence in Adolescents and Adults*, 22 J. Applied Developmental Psychol. 257 (2001) 8

Robert D. Hare, *Hare PCL-R Technical Manual* (2d ed. 2003) 22

Robert D. Hare, *Hare Psychopathy Checklist Revised* (2d ed. 2003) 22

Robert D. Hare, *Psychopathy: A Clinical Construct Whose Time Has Come*, 23 Crim. Just. & Behav. 21, 25 (1996) 20

Dana L. Haynie, *Delinquent Peers Revisited: Does Network Structure Matter?*, 106 Am. J. Sociology 1013 (2001) 8

Dana L. Haynie, *Friendship Networks and Delinquency: The Relative Nature of Peer Delinquency*, 18 J. Quantitative Criminology 99 (2002) 8

James F. Hemphill et al., *Psychopathy and Recidivism: A Review*, 3 Legal & Criminological Psycholog. 139 (1998) 21

Travis Hirschi & Michael Gottfredson, *Age and the Explanation of Crime*, 89 Am. J. Soc. 552 (1983) 6

William J. Hudspeth & Karl H. Pribram, *Psychophysiological Indices of Cerebral Maturation*, 21 Int'l J. Psychophysiology 19 (1990) 12

Peter R. Huttenlocher, *Neural Plasticity: The Effects of Environment on the Development of the Cerebral Cortex* (2002) 11

TABLE OF AUTHORITIES – Continued

Page

Charles E. Irwin, Jr., *Adolescence and Risk Taking: How Are They Related?, in Adolescent Risk Taking 7 (Nancy J. Bell & Robert W. Bell eds., 1993)* 5

Eric L. Jensen & Linda K. Metsger, *A Test of the Deterrent Effect of Legislative Waiver on Violent Juvenile Crime*, 40 Crime & Delinq. 96 (1994) 14

Saul M. Kassin & Katherine L. Kiechel, *The Social Psychology of False Confessions: Compliance, Internalization, and Confabulation*, 7 Psycholog. Sci. 125 (1996) 28

Kenneth K. Kwong et al., *Dynamic Magnetic Resonance Imaging of Human Brain Activity During Primary Sensory Stimulation*, 89 Proc. Nat'l Acad. Sci. 5675 (1992) 9

James W. Marquart et al., *Gazing into the Crystal Ball: Can Jurors Accurately Predict Dangerousness in Capital Cases?*, 23 L. & Soc'y Rev. 449 (1989) 18

M. Marsel Mesulam, *Behavioral Neuroanatomy, in Principles of Behavioral and Cognitive Neurology* 1 (M. Marsel Mesulam ed., 2d ed. 2000) 10

Terrie E. Moffitt, *Natural Histories of Delinquency, in Cross-National Longitudinal Research on Human Development and Criminal Behavior* 3 (Elmar G.M. Weitekamp & Hans-Jurgen Kerner eds., 1994) 5

Edward P. Mulvey & Elizabeth Cauffman, *The Inherent Limits of Predicting School Violence*, 56 Am. Psychologist 797 (2001) 24

TABLE OF AUTHORITIES – Continued

Page

Jari-Erik Nurmi, How Do Adolescents *See Their Future? A Review of the Development of Future Orientation and Planning*, 11 Developmental Rev. 1 (1991) 7

Office of Juvenile Justice and Delinquency Prevention, U.S. Department of Justice, *Statistical Briefing Book, at* http://ojjdp.ncjrs.org/ojstatbb/crime/qa05301.asp?qaDate=20030531 6

Allison D. Redlich & Gail S. Goodman, *Taking Responsibility for an Act Not Committed: The Influence of Age and Suggestibility*, 27 L. & Hum. Behav. 141 (2003) 29

Allan L. Reiss et al., *Brain Development, Gender and IQ in Children: A Volumetric Imaging Study*, 119 Brain 1763 (1996) 11

Elizabeth S. Scott & Laurence Steinberg, *Blaming Youth*, 81 Tex. L. Rev. 799 (2003) 13

Daniel Seagrave & Thomas Grisso, *Adolescent Development and the Measurement of Juvenile Psychopathy*, 26 L. & Hum. Behav. 219 (2002) 23

Simon I. Singer & David McDowall, *Criminalizing Delinquency: The Deterrent Effects of the New York Juvenile Offender Law*, 22 L. & Soc'y Rev. 521 (1988) 14

Jennifer L. Skeem & Elizabeth Cauffman, *Views of the Downward Extension: Comparing the Youth Version of the Psychopathy Checklist with the Youth Psychopathic Traits Inventory*, 21 Behav. Sci. & L. 737 (2003) 23

TABLE OF AUTHORITIES – Continued

Page

Elizabeth R. Sowell et al., *In Vivo Evidence for Post-Adolescent Brain Maturation in Frontal and Striatal Regions*, 2 Nature Neuroscience 859 (1999) 11

Elizabeth R. Sowell et al., *Localizing Age-Related Change in Brain Structure Between Childhood and Adolescence Using Statistical Parametric Mapping*, 9 NeuroImage 587 (1999) 11

Elizabeth R. Sowell et al., *Mapping Continued Brain Growth and Gray Matter Density Reduction in Dorsal Frontal Cortex: Inverse Relationships During Postadolescent Brain Maturation*, 21 J. Neurosci. 8819 (2001) 10

Laurence Steinberg, *Adolescence* (6th ed. 2002) 7

Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 Am. Psychologist 1009 (2003) 4, 19

R.W. Thatcher et al., *Human Cerebral Hemispheres Develop at Different Rates and Ages*, 236 Science 1110 (1987) 12

Terence P. Thornberry et al., *Delinquent Peers, Beliefs, and Delinquent Behavior: A Longitudinal Test of Interactional Theory*, 32 Criminology 47 (1994) 8

Lawrence T. White, *Juror Decision Making in the Capital Penalty Trial*, 11 L. & Hum. Behav. 113 (1987) 18

TABLE OF AUTHORITIES – Continued

Page

Richard L. Wiener et al., *Guided Jury Discretion in Capital Murder Cases: The Role of Declarative and Procedural Knowledge*, 11 Psych. Pub. Pol'y & L. (forthcoming) 26

Lawrence Winner et al., *The Transfer of Juveniles to Criminal Court: Reexamining Recidivism Over the Long Term*, 43 Crime & Delinq. 548 (1997) 15

Paul I. Yakovlev & Andre-Roch Lecours, *The Myelogenetic Cycles of Regional Maturation of the Brain, in Regional Development of the Brain in Early Life* 3 (Alexandre Minkowski ed., 1967) 12

INTEREST OF *AMICI CURIAE*[1]

The American Psychological Association (APA) is a voluntary nonprofit scientific and professional organization with more than 155,000 members and affiliates. Since 1892, the APA has been the principal association of psychologists in the United States. Its membership includes the vast majority of psychologists holding doctoral degrees from accredited universities in the United States.[2]

An integral part of the APA's mission is to increase and disseminate knowledge regarding human behavior and to foster the application of psychological learning to important human concerns. In 2001, the APA recognized that there are unique problems with assessment of juveniles who, under existing law, may be subject to the death penalty and called for a halt to such executions until it could be established that such deficiencies had been addressed. The body of research that has developed, including significant research findings in the last three years, indicates that these deficiencies have not been and cannot be corrected.

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[1] Letters from the parties consenting to the filing of this brief have been filed with the Clerk of this Court, pursuant to Sup. Ct. R. 37.3(a). No counsel for a party authored this brief in whole or in part, and no person or entity, other than the *amici curiae*, their members, or their counsel, made a monetary contribution to the preparation or submission of this brief.

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Research cited in this brief includes data from studies conducted using the scientific method. Such research typically is subject to critical review by outside experts, usually during the peer review process preceding publication in a scholarly journal.

The Missouri Psychological Association is the only statewide professional organization for Missouri psychologists. Begun in 1954, it has a membership of approximately 420. It is the professional voice for the advancement of psychology at the state Capitol, and serves Missouri's citizens through professional practice, scientific consultation, and public service.

SUMMARY OF ARGUMENT

A. At ages 16 and 17, adolescents, as a group, are not yet mature in ways that affect their decision-making. Behavioral studies show that late adolescents are less likely to consider alternative courses of action, understand the perspective of others, and restrain impulses. Delinquent, even criminal, behavior is characteristic of many adolescents, often peaking around age 18. Heightened risk-taking is also common. During the same period, the brain has not reached adult maturity, particularly in the frontal lobes, which control executive functions of the brain related to decision-making.

Adolescent risk-taking often represents a tentative expression of adolescent identity and not an enduring mark of behavior arising from a fully formed personality. Most delinquent adolescents do not engage in violent illegal conduct through adulthood.

The unformed nature of adolescent character makes execution of 16- and 17-year-olds fall short of the purposes this Court has articulated for capital punishment. Developmentally immature decision-making, paralleled by immature neurological development, diminishes an adolescent's blameworthiness. With regard to deterrence, adolescents often lack an adult ability to control impulses and anticipate the consequences of their actions. Studies call into question the effect on juvenile recidivism of harsher criminal sanctions.

B. The mitigating effect of adolescence cannot be reliably assessed in individualized capital sentencing.

Adolescents are "moving targets" for assessment of character and future dangerousness, two important considerations in the penalty phase of capital trials. As one example, psychologists have been unable to identify chronic psychopathy, also known as sociopathy, among adolescents. Assessments of such severe antisocial behaviors during adolescence have yet to be shown to remain stable as individuals grow into adulthood. Consequently, attempts to predict at capital sentencing an adolescent offender's character formation and dangerousness in adulthood are inherently prone to error and create an obvious risk of wrongful execution.

The transitory nature of adolescence also means that an adolescent defendant is much more likely to change in relevant respects between the time of the offense and the time of assessment by courts and experts. At sentencing, an offender may behave and look more like an adult than he or she did at the time the crime was committed. Impressions of the maturity and responsibility of adolescent offenders may also be impermissibly influenced by unconscious racism.

C. Immaturity of judgment, which is generally characteristic of adolescent development, will affect a defendant's participation in earlier stages of the criminal process. A recent study found adolescents overrepresented among defendants who had falsely confessed to crimes. Other research that examined psychosocial influences on legal decisions found that developmental immaturity may adversely affect an adolescent's decisions, attitudes, and behavior in the role of defendant. Individualized capital sentencing cannot correct for the heightened risk of error produced by less mature adolescent decision-making at earlier stages of the criminal process.

ARGUMENT

BEHAVIORAL STUDIES AND RECENT NEUROPSYCHOLOGICAL RESEARCH DEMONSTRATE THAT EXECUTION OF THOSE UNDER 18 YEARS OLD WHEN THEIR OFFENSES WERE COMMITTED WOULD NOT FURTHER THE CONSTITUTIONAL PURPOSES OF THE DEATH PENALTY AND WOULD NOT MEET EIGHTH AMENDMENT STANDARDS

A. Adolescents, As A Group, Think And Behave Differently From Adults In Ways That Undermine The Court's Constitutional Rationale For Capital Punishment In Cases Of Adolescent Offenders

Adolescence is the bridge between childhood and adulthood. It commonly is defined as beginning at age 10 or 11 and continuing until age 18 or 19. *See, e.g.*, Jeffrey Jensen Arnett, *Emerging Adulthood: A Theory of Development from the Late Teens Through the Twenties*, 55 Am. Psychologist 469, 476 (2000). Adolescence is a unique stage of human development, bearing its own distinctive psychosocial and physiological traits that shape judgment and behavior. Those developmental differences adversely affect the reliability of determinations about the character and long-term behavior of adolescents, including 16- and 17-year-olds, particularly with regard to the imposition of the death penalty. *See* Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 Am. Psychologist 1009, 1014-1015 (2003).

Sixteen and 17-year-olds, the vast majority of whom live at home with their families and attend secondary school, occupy a special status between childhood and young adulthood. Many social norms endorse this special status through restrictions on decision-making in, for example, voting, contracting, and jury service. In this

regard, the law presumes what science demonstrates, that 16- and 17-year-olds are not yet mature in ways that affect their decision-making capabilities.

1. Adolescence is a period in which character is forming and often involves heightened risk-taking and even criminal conduct which are moderated or eliminated by the individual in adulthood

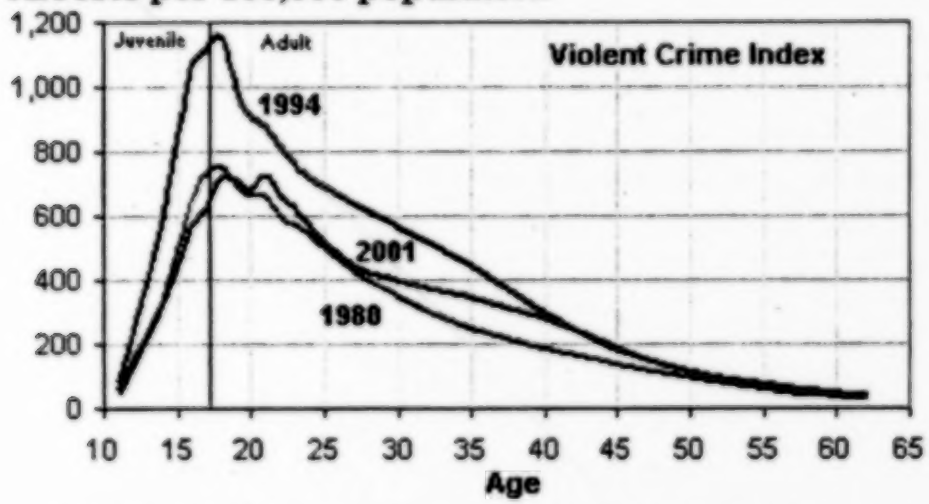
Adolescents, as a group, are overrepresented statistically in virtually every category of reckless behavior, although recklessness does not necessarily characterize all adolescents, and recklessness varies in degree. *See* Jeffrey Arnett, *Reckless Behavior in Adolescence: A Developmental Perspective*, 12 Developmental Rev. 339, 339 (1992). Late adolescence is a developmental period during which individuals are particularly prone to risky behavior. From early to late adolescence, death rates increase by more than 200% – the single largest increase between any two age groups. *See* Charles E. Irwin, Jr., *Adolescence and Risk Taking: How Are They Related?*, *in Adolescent Risk Taking* 7, 7 (Nancy J. Bell & Robert W. Bell eds., 1993). *See also* Centers for Disease Control and Prevention, *Deaths: Leading Causes for 2001*, Nat'l Vital Stat. Rep. No. 52-9, Nov. 7, 2003, at 13 (showing 2001 death rates for early and late adolescents as 19.2 and 66.9, respectively, signaling a 248% increase).

When "crime rates are plotted against age, the rates for both prevalence and incidence of offending appear highest during adolescence." Terrie E. Moffitt, *Natural Histories of Delinquency*, *in Cross-National Longitudinal Research on Human Development and Criminal Behavior* 3, 4 (Elmar G.M. Weitekamp & Hans-Jurgen Kerner eds., 1994). A steep increase "in antisocial behavior between ages 7 and 17" is mirrored by a steep decrease "in antisocial behavior between ages 17 and 30." *Id.* at 7. With slight variations, the general correlation between age and crime holds between "males and females, for most types of

crimes, during recent historical periods, and in numerous Western nations." *Id.* at 4. One cross-cultural comparison found that the age distribution of delinquency for a ten-year period was indistinguishable between Argentina, England and Wales, and the United States. Travis Hirschi & Michael Gottfredson, *Age and the Explanation of Crime*, 89 Am. J. Soc. 552, 555 (1983). The same authors concluded that "[o]ne of the few facts agreed on in criminology is the age distribution of crime." *Id.* at 552.

The same trends hold in the United States where, sampling the last two decades, the rates of offending for serious crimes build steeply to 18, before starting to drop off, as demonstrated by the following chart.

Arrests per 100,000 population



Note: The Violent Crime Index includes the offenses of murder and nonnegligent manslaughter, forcible rape, robbery, and aggravated assault.

Source: Office of Juvenile Justice and Delinquency Prevention, U.S. Department of Justice, *Statistical Briefing Book, at* http://ojjdp.ncjrs.org/ojstatbb/crime/qa05301.asp?qaDate=20030531 (last visited July 9, 2004).

On average, adolescents are risk takers to a far greater degree than adults. Behavioral studies indicate that adolescents often undervalue the true consequences

of their actions. Instead, adolescents, as a group, often value impulsivity, fun-seeking, and peer approval more than adults do. *See* Laurence Steinberg, *Adolescence* 88 (6th ed. 2002). Indeed, numerous rigorous self-report studies have documented that it is statistically normative for adolescents to engage in some form of illegal activity. *See* Moffitt, *supra*, at 29. But levels of planning and thinking about the future increase as adolescents grow older. *See* Jari-Erik Nurmi, *How Do Adolescents See Their Future? A Review of the Development of Future Orientation and Planning*, 11 Developmental Rev. 1, 29 (1991). In sum, the same person who engages in risky or even criminal behavior as an adolescent may moderate or desist from these behaviors as an adult. Indeed, most do.

2. Adolescent decision-makers on average are less future-oriented and less likely to consider properly the consequences of their actions

In comparison with adults, studies show that adolescents are less likely to consider alternative courses of action, understand the perspective of others, or restrain impulses. In a study of more than 1,000 adolescents and adults, researchers investigated the relationships among the factors of age, maturity, and antisocial decision-making. Elizabeth Cauffman & Laurence Steinberg, *(Im)maturity and Judgment in Adolescence: Why Adolescents May be Less Culpable Than Adults*, 18 Behav. Sci. & L. 741 (2000). Adolescents, on average, were "less responsible, more myopic, and less temperate than the average adult." *Id.* at 757. In this study, the most dramatic change in behavior occurred sometime between 16 and 19 years of age, especially with respect to "perspective" (*i.e.*, the consideration of different viewpoints and broader contexts of decisions), and "temperance" (*i.e.*, the ability to limit impulsivity and evaluate situations before acting). *Id.* at 756. And it was not until age 19 that this development of responsible decision-making plateaued. *Ibid.* These findings indicate "that once

the developmental changes of adolescence are complete, maturity of judgment may stabilize." *Ibid.*

In another analysis of decision-making competence, adolescents performed more poorly than adults. Bonnie L. Halpern-Felsher & Elizabeth Cauffman, *Costs and Benefits of a Decision: Decision-Making Competence in Adolescents and Adults*, 22 J. Applied Developmental Psycholog. 257, 268 (2001). Although even greater differences prevailed between younger adolescents and adults, the researchers concluded "it is clear that important progress in the development of decision-making competence occurs sometime during late adolescence." *Id.* at 271. The researchers explained that "these changes have a profound effect on their ability to make consistently mature decisions." *Ibid.* Adults, for example, were better able to weigh the options available to resolve an issue. *Id.* at 268; *see also* Lita Furby & Ruth Beyth-Marom, *Risk Taking in Adolescence: A Decision-Making Perspective*, 12 Developmental Rev. 1, 1 (1992) (highlighting how adolescents seek different outcomes than adults from decision-making).

Adolescent behavior is also affected by its social context. Peer behaviors are a very important aspect of delinquent involvement. *See* Dana L. Haynie, *Friendship Networks and Delinquency: The Relative Nature of Peer Delinquency*, 18 J. Quantitative Criminology 99, 123 (2002). Research shows that the likelihood of being influenced by peers declines after individuals reach adulthood. Peggy C. Giordano et al., *Changes in Friendship Relations Over the Life Course: Implications for Desistance from Crime*, 41 Criminology 293, 319 (2003) (longitudinal study). Increased strength of a friendship network can increase the influence of peers on behavior. *See* Dana L. Haynie, *Delinquent Peers Revisited: Does Network Structure Matter?*, 106 Am. J. Sociology 1013, 1048 (2001). Delinquent behavior, peer associations, and delinquent beliefs together influence each other. *See* Terence P. Thornberry et al., *Delinquent Peers, Beliefs, and*

Delinquent Behavior: A Longitudinal Test of Interactional Theory, 32 Criminology 47, 74-75 (1994).

3. Neuropsychological research demonstrates that the adolescent brain has not reached adult maturity

Why do adolescents show differences from adults with respect to risk-taking, planning, inhibiting impulses, and generating alternatives? Recent research suggests a biological dimension to adolescent behavioral immaturity: the human brain does not settle into its mature, adult form until after the adolescent years have passed and a person has entered young adulthood.

Advances in magnetic resonance imaging (MRI) technology have opened a new window into the differences between adolescent and adult brains. MRI technology produces exquisitely accurate pictures of the inner body and brain. Beginning in the 1990s, "functional" MRIs have allowed mapping not only of brain anatomy but observation of brain functioning while an individual performs tasks involving speech, perception, reasoning, and decision-making. *See, e.g.*, Kenneth K. Kwong et al., *Dynamic Magnetic Resonance Imaging of Human Brain Activity During Primary Sensory Stimulation*, 89 Proc. Nat'l Acad. Sci. 5675 (1992) (early use of functional MRI to image the brain). Longitudinal MRI studies have allowed researchers to track individual brains as they develop through adolescence by observing them at periodic intervals. *See, e.g.*, Jay N. Giedd et al., *Brain Development During Childhood and Adolescence: A Longitudinal MRI Study*, 2 Nature Neuroscience 861, 861 (1999) (study of 145 children and adolescents scanned up to five times over approximately 10 years).

Of particular interest with regard to decision-making and criminal culpability is the development of the frontal lobes of the brain. The frontal lobes, especially the prefrontal cortex, play a critical role in the executive or "CEO" functions of the brain which are considered the higher

functions of the brain. *See* Elkhonon Goldberg, *The Executive Brain: Frontal Lobes and the Civilized Mind* 23 (2001). They are involved when an individual plans and implements goal-directed behaviors by selecting, coordinating, and applying the cognitive skills necessary to accomplish the goal. *See id.* at 24. Disruption of functions associated with the frontal lobes may lead to impairments of foresight, strategic thinking, and risk management. *See* M. Marsel Mesulam, *Behavioral Neuroanatomy, in Principles of Behavioral and Cognitive Neurology* 1, 47-48 (M. Marsel Mesulam ed., 2d ed. 2000). Frontal lobe impairment has been associated with greater impulsivity, difficulties in concentration, attention, and self-monitoring, and impairments in decision-making. *Id.* at 42-45. One "hallmark of frontal lobe dysfunction is difficulty in making decisions that are in the long-term best interests of the individual." *See* Antonio R. Damasio & Steven W. Anderson, *The Frontal Lobes, in Clinical Neuropsychology* 404, 434 (Kenneth M. Heilman & Edward Valenstein eds., 4th ed. 2003).

Neurodevelopmental MRI studies indicate this executive area of the brain is one of the last parts of the brain to reach maturity. *See* Nitin Gogtay et al., *Dynamic Mapping of Human Cortical Development During Childhood Through Early Adulthood*, 101 Proc. Nat'l Acad. Sci. 8174, 8177 (2004). In early adolescence, the proliferation of gray matter – consisting of neuron cell bodies and dendrites – peaks. *See* Giedd et al., *supra*, at 861-862. During adolescence, the size of the frontal lobes is not largely altered, but their composition, consisting of gray and white brain matter, undergoes dynamic change while cognitive functioning improves. One important change is that gray matter thins. *See* Elizabeth R. Sowell et al., *Mapping Continued Brain Growth and Gray Matter Density Reduction in Dorsal Frontal Cortex: Inverse Relationships During Postadolescent Brain Maturation*, 21 J. Neurosci. 8819, 8821 (2001) (studying 7-11, 12-16, and 23-30 age groups). A contributing factor to the thinning of gray matter is thought to be "pruning" which strengthens the

connections between the remaining neurons. *See* Peter R. Huttenlocher, *Neural Plasticity: The Effects of Environment on the Development of the Cerebral Cortex* 41, 46-47, 52-58, 67 (2002).

MRI research reveals that in the same regions where gray matter thins, white matter significantly increases during adolescence, likely through a process called "myelination" in which a substance called myelin is wrapped around brain cell axons. Myelination improves the connectivity of neural tracts by insulating the axon thereby greatly speeding up the communication between cells, allowing the brain to process information more efficiently and reliably. *See* Goldberg, *supra*, at 144. In a study of minors ages 5 through 17, white matter within the prefrontal area of the frontal lobes steadily increased with age, likely reflecting the advances of myelination. Allan L. Reiss et al., *Brain Development, Gender and IQ in Children: A Volumetric Imaging Study*, 119 Brain 1763, 1767-1768 (1996). A longitudinal MRI study at the National Institute of Mental Health documented an increase in white matter continuing through the teenage years to at least age 22. Giedd et al., *supra*, at 861-862.[3]

A recent longitudinal MRI study captured common patterns of development by rescanning the same children and adolescents ages 4 to 21 every two years over the course of a ten-year period. Nitin Gogtay et al., *supra*.

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[3] *See also* Reiss, *supra*, at 1770 (finding expansion of white matter particularly prominent in prefrontal region of brain, an area implicated in higher order regulation of cognitive functions); Elizabeth R. Sowell et al., *Localizing Age-Related Change in Brain Structure Between Childhood and Adolescence Using Statistical Parametric Mapping*, 9 NeuroImage 587, 593 (1999) (associating change from gray to white matter in dorsal cortices of the frontal and parietal lobes with myelination in these regions of the brain); Elizabeth R. Sowell et al., *In Vivo Evidence for Post-Adolescent Brain Maturation in Frontal and Striatal Regions*, 2 Nature Neuroscience 859, 860 (1999) (remarking that reduction of frontal lobe gray matter in adolescence probably reflects increased myelination that may improve cognitive processing in adulthood).

Researchers found that the maturation of the brain cortex, or outer layer, followed "regionally relevant milestones in cognitive and functional development," *id.* at 8177, with "[p]arts of the brain associated with more basic functions matur[ing] early." *Ibid.* Again, the study confirmed that "[l]ater to mature were areas involved in executive function, attention, and motor coordination (frontal lobes)." *Ibid.*

These findings from recent MRI research converge with earlier post-mortem studies and other research exploring the maturation process of the human brain. Close correlations had previously been noted between myelination and acquisition of brain functions. *See* Paul I. Yakovlev & Andre-Roch Lecours, *The Myelogenetic Cycles of Regional Maturation of the Brain, in Regional Development of the Brain in Early Life* 3, 63-64 (Alexandre Minkowski ed., 1967). Late maturation of the frontal lobes is also consistent with electroencephalogram (EEG) research showing that the frontal executive region matures from ages 17 to 21 – after maturation appears to cease in other brain regions. William J. Hudspeth & Karl H. Pribram, *Psychophysiological Indices of Cerebral Maturation*, 21 Int'l J. Psychophysiology 19, 26-27 (1990); *see also* R.W. Thatcher et al., *Human Cerebral Hemispheres Develop at Different Rates and Ages*, 236 Science 1110, 1113 (1987) (EEG study revealed that, between age 15 and adulthood, fiber networks focused primarily in the frontal lobes grew, allowing for greater functional associations among the regions of the brain).

Emerging from the neuropsychological research is a striking view of the brain and its gradual maturation, in far greater detail than seen before. Although the precise underlying mechanisms continue to be explored, what is certain is that, in late adolescence, important aspects of brain maturation remain incomplete, particularly those involving the brain's executive functions.

4. Given that 16- and 17-year-olds as a group are less mature developmentally than adults, imposing capital punishment on such adolescents does not serve the judicially recognized purposes of the sanction

This Court has recognized that the constitutional legitimacy of the death penalty depends on its ability to serve "as retribution and deterrence of capital crimes." *Atkins v. Virginia*, 536 U.S. 304, 319 (2002) (internal quotation marks omitted). "Unless the imposition of the death penalty * * * measurably contributes to one or both of these goals, it is nothing more than the purposeless and needless imposition of pain and suffering, and hence an unconstitutional punishment." *Ibid.* (internal quotation marks omitted).

"With respect to retribution * * * the severity of the appropriate punishment necessarily depends on the culpability," *i.e.*, the blameworthiness, of the offender. *Ibid*; *see also Stanford v. Kentucky*, 492 U.S. 361, 382 (1989) (O'Connor, J., concurring in part and concurring in the judgment) (Eighth Amendment requires a proportional "nexus between the punishment imposed and the defendant's blameworthiness") (internal quotation marks omitted).

The Court already has recognized that personal culpability is lessened in the case of persons with mental retardation due to "diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others." *Atkins*, 536 U.S. at 318. When such a category of offenders exhibits significantly diminished culpability for its acts, capital punishment is prohibited because the highest degree of societal retribution is not justified. *Id.* at 319; *see also* Elizabeth S. Scott & Laurence Steinberg, *Blaming Youth*, 81 Tex. L. Rev. 799, 822-839 (2003) (proposing to exclude adolescents categorically from execution due to their developmental immaturity).

Similarly, the emerging nature of adolescent character makes the execution of 16- and 17-year-olds fall short of the purposes this Court has articulated for capital punishment. That emerging character, demonstrated by developmentally immature decision-making when compared with adults, and paralleled by a still developing brain, diminishes adolescent blameworthiness and does not merit the retribution of execution because even "the culpability of the average [adult] murderer is insufficient to justify the most extreme sanction." *Atkins*, 536 U.S. at 319.

With regard to deterrence, capital punishment will have a questionable effect on adolescents as a group because they are more impulsive and less able to anticipate the consequences of their actions. Indeed, although identifying comparable groups of juveniles who have been tried as adults versus those who have been tried as juveniles has proven difficult, research has failed to establish that the threat of adult criminal punishment through waiver or transfer into the adult criminal justice system has had any deterrent effect on adolescent misconduct. *See* Simon I. Singer & David McDowall, *Criminalizing Delinquency: The Deterrent Effects of the New York Juvenile Offender Law*, 22 L. & Soc'y Rev. 521, 529-532 (1988) (measuring New York arrest rates before and after change to require prosecution of some adolescents in criminal court); Eric L. Jensen & Linda K. Metsger, *A Test of the Deterrent Effect of Legislative Waiver on Violent Juvenile Crime*, 40 Crime & Delinq. 96, 100-102 (1994) (evaluating deterrent effect of Idaho statute mandating criminal processing as adults of adolescents charged with serious offenses).[4]

[4] Studies comparing recidivism rates between comparable groups of adolescents processed by either the criminal or juvenile justice systems showed no significant specific deterrent effect from exposure to the adult criminal justice system. *See* Jeffrey Fagan, *Separating the Men From the Boys: The Comparative Advantage of Juvenile Versus*

(Continued on following page)

As in the case of offenders with mental retardation, "it is the same cognitive and behavioral impairments that make these defendants less morally culpable * * * that also make it less likely that they will process the information of the possibility of execution as a penalty and, as a result, control their conduct based on that information." *Atkins*, 536 U.S. at 320. Thus, under *Atkins*, because research indicates that imposing capital punishment on adolescents does not "measurably contribute" to the goals of retribution or deterrence, it is "an unconstitutional punishment" in such cases. *Id.* at 319.

B. Individualized Capital Sentencing Proceedings Do Not Account For The Mitigating Effect Of Adolescence In A Sufficiently Reliable Manner To Meet The Court's Eighth Amendment Standards

Reliability has long been a touchstone of this Court's Eighth Amendment jurisprudence governing capital sentencing proceedings because of the severity and finality of the sanction. The Court has made clear that reliability takes on a heightened significance in the determination of whether a defendant should be sentenced to death because once the sanction is carried out, it is irreversible and cannot be rescinded, even if error is later revealed. "Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment

Criminal Court Sanctions on Recidivism Among Adolescent Felony Offenders, in Sourcebook on Serious, Violent & Chronic Juvenile Offenders 238, 249-250, 253-254 (James C. Howell et al. eds., 1995) (indicating recidivism rates were not generally lower for adolescents in the criminal justice system as opposed to those treated by the juvenile justice system, in a cross-jurisdictional study); Lawrence Winner et al., *The Transfer of Juveniles to Criminal Court: Reexamining Recidivism Over the Long Term*, 43 Crime & Delinq. 548, 551-562 (1997) (comparing recidivism rates of comparable adolescent offenders in Florida).

in a specific case." *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (plurality opinion). Of course, the reliability of the determination depends in substantial part on the reliability of the information that is presented to the decisionmaker. "[A]ccurate sentencing information is an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die by a jury of people who may never before have made a sentencing decision." *Gregg v. Georgia*, 428 U.S. 153, 190 (1976) (joint opinion).

Critical to the State of Missouri's position in this case is the assumption that individualized sentencing can reliably identify those adolescent defendants who do not merit execution. Individualized capital sentencing does allow the presentation of mitigating evidence, including that related to youth, which, of course, may be relevant in certain cases of young adults as well. But the changes in behavior, attitudes, perspective, risk-taking and personality that are the hallmarks of adolescence preclude reliably predicting a juvenile defendant's character in adulthood or the likelihood that he or she will continue to be dangerous in adulthood. In simpler terms, assessing an adolescent is like attempting to hit a moving target because of the developmental transitions characteristic of adolescence.

1. The unsettled nature of adolescent personality confounds attempts to make sufficiently reliable determinations about the character and future behavior of adolescent defendants to support execution

a. Under this Court's Eighth Amendment jurisprudence, capital sentencing juries must be allowed to consider evidence of the "character and record of the individual offender." *Woodson*, 428 U.S. at 304 (plurality opinion); *Lockett v. Ohio,* 438 U.S. 586, 604 (1978) (plurality opinion) (requiring that "a defendant's character or record" not be precluded from consideration as mitigating evidence). Various state statutory schemes specifically allow evidence of a defendant's character at capital sentencing. *See, e.g.*, Fla. Stat. ch. 921.141(1) ("evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant"); Cal. Penal Code § 190.3 ("evidence may be presented * * * as to * * * the defendant's character").

This Court has held that capital sentencing juries also are constitutionally permitted to consider the future dangerousness of a defendant. *See Jurek v. Texas*, 428 U.S. 262, 274-275 (1976) (plurality opinion).[5] Moreover, capital sentencing juries are sometimes required by statute to consider the future dangerousness of the defendant. Among States with the death penalty for juveniles, three include the defendant's future dangerousness as a factor that jurors must consider at sentencing in a capital case.[6] In a fourth State allowing the death penalty for juveniles, a finding of future dangerousness is required for imposition of the death penalty.[7] These four States, taken together, have executed 82 percent of the juveniles executed since 1976.

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[5] *See also Simmons v. South Carolina*, 512 U.S. 154, 163 (1994) (plurality opinion) (noting that prosecutors "frequently emphasize a defendant's future dangerousness in their evidence and argument at the sentencing phase"); *id.* at 178 (O'Connor, J., concurring in the judgment) (where State puts a capital defendant's future dangerousness at issue, due process entitles defendant to inform jury of parole ineligibility); *California v. Ramos*, 463 U.S. 992, 1003 (1983) (State constitutionally permitted to instruct capital sentencing jury to consider Governor's power to commute a life sentence without possibility of parole to a lesser sentencing allowing parole because it "focuses the jury on the defendant's probable future dangerousness").

[6] Idaho Code § 19-2515(9)(h) (considering whether defendant "has exhibited a propensity to commit murder which will probably constitute a continuing threat to society"); Okla. Stat. tit. 21, § 701.12(7) (considering whether there is a "probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society"); Va. Code Ann. § 19.2-264.2(1) (same).

[7] Tex. Crim. Proc. Code Ann. § 37.071(2)(b)(1) (precluding imposition of death sentence unless jury finds that "there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society").

Death Penalty Information Center, Juveniles Executed in the United States in the Modern Era (Since January 1, 1973) (listing 22 juvenile executions), *at* http://www.deathpenaltyinfo.org/article.php?scid=27&did=203 (last visited July 9, 2004). Evidence of future dangerousness also is presented in some jurisdictions as a nonstatutory sentencing factor.[8]

Empirical data suggest that juries tend to consider future dangerousness even when the issue is not raised by the prosecutor in the penalty phase of a capital case. John H. Blume et al., *Future Dangerousness in Capital Cases: Always "At Issue,"* 86 Cornell L. Rev. 397, 405-408 (2001) (presenting data from the Capital Jury Project); *see also* Lawrence T. White, *Juror Decision Making in the Capital Penalty Trial*, 11 L. & Hum. Behav. 113, 124 (1987) (finding factors related to dangerousness are second only to factors related to the nature of the crime in study of reasons why jurors voted for a death sentence).

A capital sentencing jury's determination of future dangerousness is a highly aggravating sentencing factor and may be outcome determinative. A study in Texas showed that capital defendants who did not receive the death penalty were usually those whom juries decided did not pose a future danger to society. *See* James W. Marquart et al., *Gazing into the Crystal Ball: Can Jurors Accurately Predict Dangerousness in Capital Cases?*, 23 L. & Soc'y Rev. 449, 463 (1989) (finding 85% of juries between 1974 and 1988 refusing to impose death penalty failed to find future dangerousness of defendant); *see also* William J. Bowers et al., *The Capital Sentencing Decision: Guided Discretion, Reasoned Moral Judgment, or Legal Fiction, in*

[8] *Cf. United States v. Spivey*, 958 F. Supp. 1523, 1534 (D.N.M. 1997) (allowing consideration of the nonstatutory aggravating factor of future dangerousness); *United States v. Nguyen*, 928 F. Supp. 1525, 1542 (D. Kan. 1996) (allowing a nonstatutory aggravating factor asking whether "[t]he defendant represents a continuing danger to the lives and safety of others in the future").

America's Experience with Capital Punishment 413, 430-431 (James R. Acker et al. eds., 2d ed. 2003) (finding in 14-State study that "defendant's likely future dangerousness [was] an especially prominent theme" in jury deliberations); Theodore Eisenberg & Martin T. Wells, *Deadly Confusion: Juror Instructions in Capital Cases*, 79 Cornell L. Rev. 1, 4-6 (1993) (finding in South Carolina study that future dangerousness ranked second only to crime itself in attention given in jury's penalty phase deliberations, overshadowing evidence presented in mitigation).

b. These two common sentencing factors of character and future dangerousness, however, present special problems of reliability in capital sentencing proceedings for 16- and 17-year-old defendants. Although mental health professionals[9] are able to characterize the functional and behavioral features of an individual adolescent, their ability to reliably predict future character formation, dangerousness, or amenability to rehabilitation is inherently limited. This is true even for adolescents with histories of delinquent behavior because misconduct diminishes at a high rate between adolescence and adulthood. Thus, mental health professionals' ability to reliably distinguish between the relatively few adolescents who will continue as career criminals and the vast majority of adolescents who will, as adults, "repudiate their reckless experimentation" is limited. *See* Steinberg & Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, *supra*, at 1016.

The manual that governs the professional evaluation of psychiatric disorders wisely bars diagnosis of antisocial personality disorder in individuals under the age of 18. American Psychiatric Association, *Diagnostic and Statistical*

[9] "Mental health professionals" is used here to include psychologists, psychiatrists and others who assess adolescents, particularly within the context of capital sentencing.

Manual of Mental Disorders 702, 706 (4th ed. text rev. 2000) (DSM). For adolescent personality disorders in general, the DSM cautions that they cannot be diagnosed except in the "relatively unusual instances in which the individual's particular maladaptive personality traits appear to be pervasive, persistent, and unlikely to be limited to a particular developmental stage," *id.* at 687, or to "an episode of an Axis I disorder," *e.g.*, depression. *Ibid.* The DSM's limitation on assessing antisocial personality disorder is even more severe, categorically prohibiting its diagnosis "in individuals under age 18 years." *Ibid.*

Consequently, attempts to predict at capital sentencing an adolescent offender's character formation and dangerousness in adulthood are inherently prone to error and create an obvious risk of wrongful execution. The same evidence which could be used to argue that a death sentence is warranted in a case of an adult defendant may, in an adolescent, very well reflect transitory behavior that would not support such an argument.

This problem arises, in particular, in the labeling of some adolescent offenders as psychopaths. Psychopathy, sometimes referred to as sociopathy, is an adult personality feature defined chiefly by a combination of antisocial behavior, callousness, and emotional detachment. *See* Robert D. Hare, *Psychopathy: A Clinical Construct Whose Time Has Come*, 23 Crim. Just. & Behav. 21, 25 (1996). Psychopaths have been described as "[l]acking in conscience and in feelings for others, [and] . . . cold-bloodedly tak[ing] what they want and do[ing] what they please, violating social norms and expectations without the slightest sense of guilt or regret." *Id.* at 26.

Unlike disorders such as depression, psychopathy is presumed to be deep seated, stable over time, and resistant, if not absolutely impervious, to change. Some experts have gone so far as to conclude that "at this time there is *no empirical* evidence to suggest that psychopathy is treatable." Carl B. Gacono et al., *Treating Conduct Disorder, Antisocial, and Psychopathic Personalities, in Treating Adult and*

Juvenile Offenders with Special Needs 99, 113 (Jose B. Ashford et al. eds., 1997) (emphasis in original). As a group, psychopaths "are responsible for a markedly disproportionate amount of the serious crime, violence, and social distress in every society." Hare, *supra*, at 26. One analysis concluded that psychopathic offenders were approximately four times as likely to commit a future violent crime as were non-psychopathic offenders. James F. Hemphill et al., *Psychopathy and Recidivism: A Review*, 3 Legal & Criminological Psycholog. 139, 160 (1998).

Evidence of psychopathy can strongly encourage the imposition of the death penalty in a particular case. Indeed, some of the cases which have shaped the Court's death sentencing jurisprudence have centered on evidence of psychopathic tendencies. *See, e.g., Estelle v. Smith*, 451 U.S. 454, 459-460 (1981) (State's evidence that defendant was "a very severe sociopath"); *Satterwhite v. Texas*, 486 U.S. 249, 259-260 (1988) (State's evidence that defendant would be a continuing threat to society and was "as severe a sociopath as you can be"); *Barefoot v. Estelle*, 463 U.S. 880, 918-919 (1983) (Blackmun, J., dissenting) (State's evidence that defendant was a "criminal sociopath" whom no treatment could change). In a recent study measuring the effect on laypersons of hypothetical traits, participants were considerably more likely to support a death sentence when an adolescent offender was described as psychopathic. John F. Edens et al., *Psychopathic Traits Predict Attitudes Toward a Juvenile Capital Murderer*, 21 Behav. Sci. & L. 807, 822 (2003).

The antisocial phenomena that are emblematic of psychopathy in adults are difficult to assess with adolescents. The researcher whose groundbreaking description of the psychopathic personality became the basis for modern diagnostic techniques warned that "the child or the adolescent will for a while behave in a way that would seem scarcely possible to anyone but the true psychopath and later change, becoming a normal and useful member of society." Hervey Cleckley, *The Mask of Sanity* 270 (5th ed.

1976); *see also* John F. Edens et al., *Assessment of "Juvenile Psychopathy" and Its Association with Violence: A Critical Review*, 19 Behav. Sci. & L. 53, 77 (2001) ("Because most adolescents manifest some 'traits' and behaviors during this period that may be phenotypically similar to symptoms of psychopathy, adolescence may be the most difficult stage of life in which to detect this personality pattern.").

Using standard psychological appraisals, various behaviors and traits that are associated with normal development in adolescents are, in adults, indicative of psychopathy. These include proneness to boredom, impulsivity, irresponsibility, failure to accept responsibility for one's actions, and unstable interpersonal relationships. *See* Robert D. Hare, *Hare Psychopathy Checklist Revised* (2d ed. 2003) (PCL-R).[10] More recently, this checklist has been modified for adolescents, Adelle E. Forth et al., *Hare Psychopathy Checklist: Youth Version* (2003) (PCL-YV), but the revision maintains the basic structure of the adult version, modifying application of some adult factors, such as the adult "short-term marital relationships" factor. Adelle E. Forth & Heather C. Burke, *Psychopathy in Adolescence: Assessment, Violence, and Developmental Precursors, in Psychopathy: Theory, Research and Implications for Society* 205, 207 (David J. Cooke et al. eds., 1995).

[10] The complete Hare Psychopathy Checklist Revised comprises two factors. The "Interpersonal/Affective" factor includes glibness/superficial charm; grandiose sense of self-worth; pathological lying; conning/manipulative; lack of remorse or guilt; shallow affect; callous/lack of empathy; failure to accept responsibility for actions. The "Social Deviance" factor includes need for stimulation/proneness to boredom/parasitic lifestyle; poor behavioral controls; early behavior problems; lack of realistic long-term goals; impulsivity; irresponsibility; juvenile delinquency; revocation of conditional release and criminal versatility. Other items are promiscuous sexual behavior and many short-term marital relationships. Robert D. Hare, *Hare PCL-R Technical Manual* 85 (2d ed. 2003).

Although the PCL-YV and other measures of psychopathy may aid in making short-term predictions of violent behavior in adolescence, "they provide little support for the argument that psychopathy during adolescence is a robust predictor of *future* violence, particularly violence that occurs beyond late adolescence." Edens et al., *Assessment of "Juvenile Psychopathy" and Its Association with Violence: A Critical Review*, *supra*, at 73 (emphasis in original). Despite findings of stability over a few months of psychopathic traits among adolescents, "[c]learly, there are no data to determine the actual risk for adult diagnosis in children who score high on psychopathic traits." Paul J. Frick et al., *The 4 Year Stability of Psychopathic Traits in Non-Referred Youth*, 21 Behav. Sci. & L. 713, 732 (2003). In gauging whether two different tests of psychopathy tracked each other or merely tracked indicia of normal immaturity in adolescents, one study concluded that "[t]hese measures of psychopathy, a distinctive constellation of enduring personality traits, were less strongly associated with one another than with measures of immaturity, a broad set of incapacities associated with normative phases of development [in adolescents]." Jennifer L. Skeem & Elizabeth Cauffman, *Views of the Downward Extension: Comparing the Youth Version of the Psychopathy Checklist with the Youth Psychopathic Traits Inventory*, 21 Behav. Sci. & L. 737, 764 (2003); *see also* Daniel Seagrave & Thomas Grisso, *Adolescent Development and the Measurement of Juvenile Psychopathy*, 26 L. & Hum. Behav. 219, 229 (2002) (expressing concern over "false positive" rate in identifying psychopathic traits in adolescents).

c. The sentencing process is ill-suited to discern the difference between transitory adolescent behavior and enduring adult character traits. These distinctions are critical for determining a capital defendant's character and future dangerousness. The observable behavior of different adolescents can be identical in adolescents who will persist as criminal offenders through adulthood and those who will not. *See* Edens et al., *Assessment of "Juvenile Psychopathy" and Its Association with Violence: A Critical Review*, *supra*,

at 59 (measures of psychopathy may tap "relatively *normative* and *temporary* characteristics of adolescence rather than deviant and stable personality features") (emphasis in original); *cf.* Thomas Grisso, *Double Jeopardy: Adolescent Offenders with Mental Disorders* 64-65 (2004) (discontinuity of disorders in adolescence creates "moving targets" for identification of mental disorders); Edward P. Mulvey & Elizabeth Cauffman, *The Inherent Limits of Predicting School Violence*, 56 Am. Psychologist 797, 799 (2001) ("Assessing adolescents, therefore, presents the formidable challenge of trying to capture a rapidly changing process with few trustworthy markers.").

The likelihood of error in ascertaining putatively enduring features of an adolescent's behavior is high. The fundamental problem is found in the inability to distinguish in a reliable way between the few adolescent offenders who may not be amenable to rehabilitation and the many who will spontaneously desist or who will respond to sanction or intervention. The absence of proof that assessments of adolescent behavior will remain stable into adulthood invites unreliable capital sentencing based on faulty appraisals of character and future conduct.

2. The lapse of time between a crime and sentencing tends to complicate assessment of the adolescent capital defendant

Even if a sufficiently reliable means existed to assess the true character and future dangerousness of an adolescent defendant, the maturation of an adolescent that occurs between the date of a crime and the time of a capital sentencing assessment further complicates efforts to capture accurately an adolescent's capacities and maturity at the time of an offense. The lapse of time is likely to involve much more significant psychological changes in adolescents than in adults.

An evaluation performed for the purpose of capital sentencing will consider an adolescent who has, necessarily,

aged since the date of the offense. Having advanced further through puberty, the defendant may have more the appearance of a man than the boy who committed the offense. In one juvenile case, jurors imposed a death sentence, at least in part, based on the defendant's seemingly more adult physical appearance. Michael E. Antonio et al., *Capital Jurors as the Litmus Test of Community Conscience for the Juvenile Death Penalty*, 87 Judicature 275, 282 (2004) (discussing data from the Capital Jury Project). The defendant was nearing 21 years of age by the time of trial, was physically imposing, unusually tall, and characterized by one juror as a "tall, pretty muscular black guy." *Ibid.* Interestingly, several jurors described him "as utterly emotionless, despite other jurors' reports of his tears at the mention of his murdered brother" and his mother's testimony. *Ibid.*

Neurodevelopmental maturation may have altered the adolescent's impulsivity, difficulty in weighing options, vulnerabilities to situational factors or other features of relative developmental immaturity that existed at the time of the offense. Exposure to the adult corrections system while awaiting trial and sentencing can also affect adolescents, their behavior and their presentation. In a study of the impact of incarceration on adolescents, offenders reported that, at best, experience in adult facilities was a test of will and endurance and, at worst, a painful and denigrating experience that served as reason to become "more angry, embittered, cynical and defeated." Donna Bishop & Charles Frazier, *Consequences of Transfer*, *in The Changing Borders of Juvenile Justice: Transfer of Adolescents to the Criminal Court* 227, 259 (Jeffrey Fagan & Franklin E. Zimring eds., 2000).

A more adult appearance at sentencing is harder to reconcile with whatever mitigating evidence of immaturity may be introduced. The professional opinion rendered by experts for the purpose of capital sentencing and the impression left with the sentencer during trial will reflect an older, more mature person, even though the offending

behaviors at issue were adolescent. Thus, in many cases, the judge and jury will encounter a person who is different in highly relevant respects from the individual who committed the crime. The passage of months or perhaps years between the offense and sentencing may punish a defendant because he appears, thinks, and behaves in a more mature fashion than he did when he committed the offense, eliminating the opportunity to judge the defendant's developmental state at the time of the crime. *Cf.* Richard L. Wiener et al., *Guided Jury Discretion in Capital Murder Cases: The Role of Declarative and Procedural Knowledge*, Psych. Pub. Pol'y & L. (forthcoming 2004) (ms. at 74-82) (studying the inadequacies of jury instructions to explain needed concepts in the penalty phase of first-degree murder trials).

3. Unconscious racism may falsely attribute greater culpability to African American adolescent offenders

The assessment of the maturity and responsibility of individual adolescent offenders also can be impermissibly influenced by unconscious bias. Recent research has revealed that a stereotyped belief that African American adolescents possess more adult-like criminal intent may taint judgments about the culpability of adolescent offenders. Police officers and probation officers reported more negative trait ratings, greater perceived culpability, less child-like qualities and recommended harsher punishment for adolescents after the officers were provided a set of subliminal cues related to African Americans. Sandra Graham & Brian S. Lowery, *Priming Unconscious Racial Stereotypes About Adolescent Offenders*, L. & Hum. Behav. (forthcoming 2004) (ms. at 18-19, 25-26). Police and probation officers induced to think about African Americans were less likely to judge the hypothetical juvenile offenders as immature, and more likely to think of them as adult-like in their behavior. *Ibid.*

Previous research found that probation officers are more likely to attribute the criminality of African American adolescents to negative personal defects such as a lack of remorse, while they are more likely to attribute criminal behavior of white adolescents to negative environmental causes such as a dysfunctional family. George S. Bridges & Sara Steen, *Racial Disparities in Official Assessments of Juvenile Offenders: Attributional Stereotypes as Mediating Mechanisms*, 63 Am. Soc. Rev. 554, 559, 561-564 (1998) (summarizing regression analysis of 233 probation officer reports controlling for variables such as age, sex, offense, and prior record).[11]

C. Individualized Capital Sentencing Cannot Correct For The Heightened Risk Of Error Produced By Immature Adolescent Decision-making At Earlier Stages Of The Criminal Process

Judgments made by adolescents, who on average are less mature than adults, will also affect a defendant's participation at the stages of the criminal process before sentencing. Adolescent immaturity undermines a defendant's ability to make meaningful and fully informed decisions to manage his or her own defense. Decisions by a defendant throughout the investigatory and trial process may influence whether the death penalty will be sought or imposed. As is true for defendants with mental retardation, the possibility

[11] Since 1976, 55% of those executed in the United States who were under 18 at the time of their offense were African American or Latino. Death Penalty Information Center, Juveniles Executed in the United States in the Modern Era (Since January 1, 1973) (listing 22 juvenile executions since 1976), *at* http://www.deathpenaltyinfo.org/article.php?scid=27&did=203 (last visited July 9, 2004). In contrast, 40% of the adult offenders sentenced to death since 1976 were African American or Latino. Death Penalty Information Center, Execution Database (listing 895 adult executions since 1976), *at* http://www.deathpenaltyinfo.org/executions.php (last visited July 9, 2004).

of false confessions, difficulties in giving meaningful assistance to counsel, and poor performance as witnesses all increase the likelihood that adolescents will be convicted, and then executed, in error. *See Atkins*, 536 U.S. at 320-321.

A recent analysis found that adolescents were overrepresented among those who falsely confessed in response to interrogation. Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. Rev. 891, 944 (2004). Among a total of 113 false confessors, 16% were between the ages of 16 and 17, representing the highest concentration among any averaged two-year age group. *Id.* at 945, table 3.[12] Among all cases studied, false confessions were concentrated in the most serious offenses, the overwhelming majority occurring in murder cases (81%), followed by cases of rape (9%) and arson (3%). *Id.* at 946. One case was that of the Central Park jogger victim in which four 14- to 16-year-old defendants were convicted of rape or other crimes on the basis of their confessions, but later were exonerated by DNA evidence linking the crime to a notorious serial rapist. *Id.* at 894-900.

False evidence presented by authorities to an individual in an effort to elicit a confession can lead an individual to confess to an act he or she did not commit. The same individual may then internalize the confession and confabulate details consistent with the false confession. *See* Saul M. Kassin & Katherine L. Kiechel, *The Social Psychology of False Confessions: Compliance, Internalization, and Confabulation*, 7 Psycholog. Sci. 125, 127 (1996) (69% of test participants signed confessions admitting to errors

[12] Twelve other defendants in the study were not counted in these results because their ages were unknown. *Id.* at 945, n. 350. Together, the 125 defendants in the study constituted "the largest collection of interrogation-induced false confession cases ever assembled and analyzed in the research literature." *Id.* at 924. All cases involved confessions that were "indisputably false." *Id.* at 925.

they did not commit in assigned clerical tasks). Research indicates that adolescents are more susceptible to these kinds of suggestion of guilt than are adults. In a study comparing 15- and 16-year-olds to young adults ages 18 to 26, the adolescents were more likely to take responsibility for a mock crime when presented with false evidence of their guilt. Allison D. Redlich & Gail S. Goodman, *Taking Responsibility for an Act Not Committed: The Influence of Age and Suggestibility*, 27 L. & Hum. Behav. 141, 151 (2003).

The reliability of convictions and sentences can also be directly affected by adolescent defendants' understanding of their legal rights. In a recent study of more than 1,300 adolescents and young adults, researchers found adolescent immaturity of judgment reflected in adolescent decision-making concerning criminal proceedings. Thomas Grisso et al., *Juveniles' Competence to Stand Trial: A Comparison of Adolescents' and Adults' Capacities as Trial Defendants*, 27 L. & Hum. Behav. 333 (2003). The research examined psychosocial influences on legal decisions that criminal defendants are often required to make, involving whether to confess to the police or remain silent, whether or to what extent to communicate with counsel, and whether to accept a prosecutor's plea offer. *Id.* at 336. After participants completed a standardized measure of abilities relevant to competency to stand trial, *i.e.*, participating in and understanding the trial process, researchers went on to assess the relationship between immaturity and the choices made in the course of a criminal adjudication. *Ibid.* Adolescents, including older adolescents who scored at adult levels on measures of capacity relevant to legal competence to stand trial, nonetheless tended more often than adults to make choices that reflected the influences of psychosocial immaturity. *Id.* at 336-337, 343.

Although older adolescents were more likely than younger adolescents to recognize potential risks and understand how unpleasant consequences would be if they occurred, their perception of the likelihood that the adverse

consequences would actually occur was not significantly different than that of younger adolescents. *Id.* at 354. Consequently, the researchers concluded that "psychosocial immaturity may affect a young person's decisions, attitudes, and behavior in the role of defendant in ways that do not directly implicate competence to stand trial, but that may be quite important to how they make choices, interact with police, relate to their attorneys, and respond to the trial context." *Id.* at 361. That means that adolescents "may make different legal decisions than they themselves would make in their adult years." *Id.* at 335.

CONCLUSION

For the reasons set forth above and in respondent's brief, the judgment of the Missouri Supreme Court should be affirmed.

Respectfully submitted,

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In The Supreme Court of the United States

DONALD P. ROPER, Superintendent,
Potosi Correctional Center,

Petitioner,

v.

CHRISTOPHER SIMMONS,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Missouri

BRIEF OF *AMICI CURIAE* PRESIDENT JAMES EARL CARTER, JR., PRESIDENT FREDERIK WILLEM DE KLERK, PRESIDENT MIKHAIL SERGEYEVICH GORBACHEV, PRESIDENT OSCAR ARIAS SANCHEZ, PRESIDENT LECH WALESA, SHIRIN EBADI, ADOLFO PEREZ ESQUIVEL, THE DALAI LAMA, MAIREAD CORRIGAN MAGUIRE, DR. JOSEPH ROTBLAT, ARCHBISHOP DESMOND TUTU, BETTY WILLIAMS, JODY WILLIAMS, AMERICAN FRIENDS SERVICE COMMITTEE, AMNESTY INTERNATIONAL, INTERNATIONAL PHYSICIANS FOR THE PREVENTION OF NUCLEAR WAR, AND THE PUGWASH CONFERENCES ON SCIENCE AND WORLD AFFAIRS (NOBEL PEACE PRIZE LAUREATES) IN SUPPORT OF RESPONDENT

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Atkins v. Virginia, 536 U.S. 304 (2002) 25

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Benton v. Maryland, 395 U.S. 784 (1969) 22

Blyew v. United States, 80 U.S. (13 Wheat) 581 (1871) (Mem.) 20

Bors v. Preston, 111 U.S. 252 (1884) 20

Coker v. Georgia, 433 U.S. 584 (1977) 3, 12

Culombe v. Connecticut, 367 U.S. 568 (1961) 12

Enmund v. Florida, 458 U.S. 782 (1982) 3, 12

Foster v. Florida, 537 U.S. 990 (2002) 29

Furman v. Georgia, 408 U.S. 238 (1972) 22

Hilton v. Guyot, 159 U.S. 113 (1895) 20

Hurtado v. California, 110 U.S. 516 (1884) 21

Kepner v. United States, 195 U.S. 100 (1900) 23

Kilbourn v. Thompson, 103 U.S. 168 (1881) 12

La Abra Silver Mining Co. v. United States, 175 U.S. 423 (1899) 20

Lawrence v. Texas, 539 U.S. 558, 123 S. Ct. 2472 (2003) 25, 29

Mackey v. United States, 401 U.S. 667 (1971) 25, 26

Miller v. The Resolution, 2 U.S. (2 Dall.) 1 (1781) (Mem.) 20

TABLE OF AUTHORITIES – Continued

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Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64 (1804) 5

Palko v. Connecticut, 302 U.S. 319 (1937) 22

Penry v. Lynaugh, 492 U.S. 302 (1989) 25, 26

Stanford v. Kentucky, 492 U.S. 361 (1989) 13, 25

Tenn v. Davis, 100 U.S. 257 (1879) (Mem.) 20

The Estrella, 17 U.S. (4 Wheat.) 298 (1819) (Mem.) 20

The Apollon, 22 U.S. (9 Wheat.) 362 (1824) 5

The Paquete Habana, 175 U.S. 677 (1900) 20

Thompson v. Oklahoma, 487 U.S. 815 (1988) 12

Trop v. Dulles, 356 U.S. 86 (1958) ..... *passim*

United States v. Ortega, 24 U.S. (11 Wheat.) 467 (1826) (Mem.) 20

Washington v. Glucksberg, 521 U.S. 702 (1997) 12

Weems v. United States, 217 U.S. 349 (1910) 22, 23

UNITED STATES FEDERAL COURTS

Committee of United States Citizens Living in Nicaragua v. Reagan, 859 F.2d 929 (D.C. Cir. 1988) 5

Gisbert v. United States Attorney General, 988 F.2d 1437 (5th Cir. 1993) 5

UNITED STATES STATE COURTS

Ex parte Martinez, 145 S.W. 959 (Tex. Crim. App. 1912) 20

TABLE OF AUTHORITIES – Continued

Page

UNITED STATES GOVERNMENT DOCUMENTS

Brief for the United States as Amicus Curiae, *Domingues v. Nevada*, No. 98-8327, 1999 WL 33639524 (Oct. 4, 1999) 25, 26

House Judiciary Subcommittee on the Constitution, Appropriate Role of Foreign Judgments in the Interpretation of American Law, March 25, 2004, http://commdocs.house.gov/committees/judiciary/hju92673.000/hju92673_0f.htm ("Hearing Transcript" at Ramsey, page 96; last visited July 12, 2004) 25

Senate Committee On Foreign Relations Report on the International Covenant on Civil and Political Rights, S. Exec. Report. No. 23, 102d Cong., 2d Sess. (1992), *reprinted in* 31 I.L.M. 645 (1992) 8

United States Department of State, Country Reports on Human Rights Practices 2003, *available at* http://www.state.gov/g/drl/rls/hrrpt/2003/index.htm (last visited July 6, 2004) 29

NATIONAL SUPREME COURTS

Resolution of the Court En Banc, Luzviminda Puno, Supreme Court of the Philippines, O.C. No. 01-20, *Re: Letter of Ma. Victoria S. Diaz, Program Development Officer, Jesuit Prison Service*, dated July 30, 2002, filed Aug. 1, 2002 18

State vs. T. Makwanyane and M. Mchunu, 1995 (3) SALR 391 (C.C.) 14

TABLE OF AUTHORITIES – Continued

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NATIONAL CONSTITUTIONS AND STATUTES

18 U.S.C. § 3591 26

Child Law 1993, Law No. 9/93, §§ 45 and 71 (enacted July 14, 1993) (Myan.) 18

Children Act 1908, Section 103, United Kingdom 12

Children and Young Persons Act 1933, Section 53(1), United Kingdom 13

Criminal Justice Act 1948, Section 16, United Kingdom 13

Criminal Law of the People's Republic of China, adopted by the Second Session of the Fifth National People's Congress on July 1, 1979, and amended by the Fifth Session of the Eighth National People's Congress on March 14, 1997, Chapter Three, Section Five, Article 49 17

Criminal Procedure Act No. 51 of 1977, § 277(3)(b) (S.Afr.) 13

Criminal Procedure (Amendment) Bill, 1952 (Hong Kong) 13

Homicide Act 1957, Section 17, United Kingdom 13

S. Afr. Const. 14

The English Declaration of Rights, Part V, Article X (1 Wm. & Mary, 2d Sess. (1689), c. 2.) 22

INTERNATIONAL COURTS AND COMMISSIONS

Asylum Case (Colum. v. Peru), 1950 I.C.J. 266 (Nov. 30) 3

TABLE OF AUTHORITIES – Continued

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Barcelona Traction, Light & Power Co., Ltd. (Belgium v. Spain), Second Phase, 1970 I.C.J. 3 (Feb. 5) 4

Beazley v. United States, Inter-Am. C.H.R., Report No. 101/03, Merits Case 12.412, December 29, 2003 ..... 4, 19, 25

Domingues v. United States, Inter-Am. C.H.R., Report No. 62/02, Merits Case 12.285, October 22, 2002 ..... *passim*

Graham v. United States, Inter-Am. C.H.R., Report No. 97/03, Merits Case 11.193, December 29, 2003 ..... 4, 19, 25

Restrictions on the Death Penalty (Articles 4(2) and 4(4) American Convention on Human Rights, Advisory Opinion No. OC-3/83 of Sept. 8, 1983, Inter-Am. Ct. H.R., ser. A: Judgments and Opinions, No. 3 (1983), *reprinted in* 23 I.L.M. 320, 341 (1984) 10

Statute of the International Court of Justice, June 26, 1945, 59 Stat. 1055, T.S. 993 ..... 3, 7

Soering v. United Kingdom, 11 Eur. Ct. H.R. 439 (1989) 15

Thomas v. United States, Inter-Am. C.H.R., Report No. 100/03, Merits Case 12.240, December 29, 2003 ..... 4, 19, 25

TREATIES

American Convention-on Human Rights, Nov. 22, 1969, 1144 U.N.T.S. 123, 9 I.L.M. 673 ..... 7, 9

TABLE OF AUTHORITIES – Continued

Page

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted* Dec. 10, 1984, G.A. Res. 39/46, 39 U.N. GAOR Supp. (No. 51), U.N. Doc. A/39/51 (1984) 6

Department Federal des Affaires Etrangeres (Swiss), *Etats parties aux quatre Conventions de Geneve pour la protection des victims de la guerre*; link located at http://www.icrc.org/eng/party_gc (last visited July 10, 2004) 10

European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 221, E.T.S. 5, *entered into force,* Sept. 3, 1953 14

Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 3560, 75 U.N.T.S. 286 (ratified by the United States 1955) 7

International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368 (ratified by the United States June 8, 1992) ..... *passim*

Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, U.N. GAOR, 54th Sess., Annex I, U.N. Doc. A/RES/54/263 (2000) (ratified by United States 2002) 10

Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty, *opened for signature* April 28, 1983, E.T.S. 14 (*entered into force* March 1, 1985) 15

TABLE OF AUTHORITIES – Continued

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Reservations, Declarations, Notifications and Objections relating to the International Covenant on Civil and Political Rights and the Optional Protocols thereto, U.N. Doc. CCPR/C/2/Rev.4 (1994) 8, 24

United Nations Charter 27

United Nations Convention on the Rights of the Child, *adopted* Nov. 20, 1989, 1577 U.N.T.S. 3, 28 I.L.M. 1448 ..... *passim*

Vienna Convention on the Law of Treaties, *adopted* May 22, 1969, 1155 U.N.T.S. 331, UN Doc. A/CONF. 39/27 ..... 4, 9

UNITED NATIONS DECLARATIONS/RESOLUTIONS

G.A. Res. 35/172, U.N. GAOR Supp. (No. 48) at 195, U.N. Doc. A/35/48 (1980) 26

The Question of the Death Penalty, Comm. On Hum. Rts., 57th Sess., Resolution 2001/68, *adopted* April 25, 2001, E/CN.4/2001/RES/68 (2001) 11

The Question of the Death Penalty, Comm. On. Hum. Rts., 56th Sess., Resolution 2000/65, *adopted* April 26, 2000, E/CN.4/RES/2000/65 (2000) 11

The Question of the Death Penalty, Comm. On. Hum. Rts., 55th Sess., Resolution 1999/61, *adopted* April 28, 1999, E/CN.4/RES/1999/61 (1999) 11

TABLE OF AUTHORITIES – Continued

Page

Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, E.S.C. Res. 1984/50, annex, 1984 U.N. ESCOR Supp. (No.1), U.N. Doc. E/1984/84 (1984) 11

United Nations Commission on Human Rights, *Report to the Economic and Social Council on the Sixtieth Session of the Commission* (Draft Report), Res. 2004/48, *adopted* April 20, 2004, U.N. Doc. E/CN.4/2004/L.11/Add.5 11

United Nations Sub-Commission on the Promotion and Protection of Human Rights, *The death penalty in relation to juvenile offenders*, Res. 2000/17, 26th mtg., U.N. Doc. E/CN.4/SUB.2/RES/2000/17 (2000) 19, 24

United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules"), Rule 17.2, G.A. res. 40/33, U.N. GAOR, 40th Sess., Supp. No. 53, at 207, U.N. Doc A/40/53 (1985) 11

Universal Declaration of Human Rights ("UDHR"), G.A. res. 217A (III), U.N. Doc A/810 (1948) 27

UNITED NATIONS DOCUMENTS

United Nations Committee on the Rights of the Child, Annual Report of the United Nations Committee on the Rights of the Child, U.N. GAOR, 51st Sess., Supp. No. 41, U.N. Doc. A/51/41 (1996) 10

TABLE OF AUTHORITIES – Continued

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United Nations High Commissioner for Human Rights, *Status of Ratifications of the Principal International Human Rights Treaties, as of 09 June 2004, available at* http://www.unhchr.ch/pdf/report.pdf (last visited July 18, 2004) 7, 9

United Nations Human Rights Commission, Summary Record of the 53rd Meeting of the Commission on Human Rights, 56th Sess., April, 17, 2000, U.N. Doc. E/CN.4/2000/SR.53 (2000) 16

United Nations Human Rights Committee, *Concluding Observations of the Human Rights Committee: United States of America*, U.N. GAOR Hum. Rts. Comm., 50th Sess., ¶¶ 279, 292, U.N. Doc. CCPR/C/79/Add.50, A/50/40 (1995) 9

United Nations Sub-Commission on the Promotion and Protection of Human Rights, Summary Record of 6th Meeting of the Sub-Commission on the Promotion and Protection of Human Rights, 52nd Sess., 4th August, 2000, E/CN.4/Sub.2/2000/SR.6 para.39 (2000) 16

TREATISES AND LAW REVIEW ARTICLES

Victor Bailey, *The Shadow of the Gallows: The Death Penalty and the British Labour Government, 1945-51*, 18 Law & Hist. Rev. 305 (2000) 12, 13

Ian Brownlie, Principles of Public International Law (3d ed., Oxford, Clarendon Press, 1979) 9

Louis Henkin, *Comment: U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 Amer. J. Int. L. 341 (1995) 26

TABLE OF AUTHORITIES – Continued

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Harold Hongju Koh, *International Law as Part of Our Law*, 98 AJIL 43 (2004) 21

Jules Lobel, *The Limits of Constitutional Power: Conflicts between Foreign Policy and International Law*, 71 Va. L. Rev. 1071 (1985) 5

Gerald L. Neuman, *The Uses of International Law in Constitutional Interpretation*, 98 Am. J. Int'l L. 82, 83 (2004) 21

Sir Leon Radzinowicz and Roger Hood, *Judicial Discretion and Sentencing Standards: Victorian Attempts to Solve a Perennial Problem*, 127 U. Pa. L. Rev. 1288 (1979) 13

Restatement (Third) of the Foreign Relations Law of the United States § 102 (2) (1987) 3

William A. Schabas, *Invalid Reservations to the International Covenant on Civil and Political Rights: Is the United States Still a Party?*, 21 Brook. J. Int'l L. 277 (1995) 10

PRESS ARTICLES/RELEASES

Mongkol Bangprapa, *Jail-term limits pass first vote – 50-year maximum penalty for minors*, The Bangkok Post, March 14, 2003 18

Iran to stop executions of 15-18 year olds, The New Zealand Herald, September 29, 2003, *available at* http://www.nzherald.co.nz/latestnewsstory.cfm?storyID=3526022&thesection=news&thesubsection=world 17

Pakistan News Service, *74 Get Relief Against Death Sentence*, July 25, 2002 16

TABLE OF AUTHORITIES – Continued

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Scott Peterson, *Despite Islamic Law, Yemen Bans Teen Death Penalty*, Christian Sci. Monitor, Feb. 2, 2000 16

United Nations Press Release, *Commission on Human Rights Adopts Resolutions on Rights of Women and Children, Specific Groups, Indigenous Issues*, 20 April 2004 11

U.N. Press Release, *Commission on Human Rights Starts Debate on Specific Groups and Individuals*, 11 April 2001, Right of Reply by Representative of Iran 17

OTHER DOCUMENTS

Amnesty International, *The Exclusion of Child Offenders from the Death Penalty Under General International Law*, July 2003, AI Index: ACT 50/004/2003 ..... 15, 16, 17

Amnesty International, *United States of America: Supreme Court to Revisit Constitutionality of Executing Child Offenders*, AMR 51/020/2004, January 27, 2004 ..... 16, 17

Council of Europe, Parliamentary Assembly, *Abolition of the Death Penalty in Council of Europe Observer States*, Report, Doc. 9908, 11 September 2003 14

European Union, *EU Demarche on the Death Penalty*, May 10, 2001 (presented by Swedish Presidency) 14

European Union, *Guidelines to EU Policy Towards Third Countries on the Death Penalty*, adopted by the Council of the European Union, June 3, 1998 14

TABLE OF AUTHORITIES – Continued

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Final Statement of the Fourth World Summit of Nobel Peace Laureates, Rome, November 30, 2003, *available at* http://www.ippnw.org/NobelPeaceSummit2003.html (last visited July 12, 2004) 2

Jimmy Carter, Nobel Lecture at the Nobel Academy Dec. 10, 2002, *available at* http://www.nobel.se/peace/laureates/2002/carter-lecture.html (last visited June 30, 2004) 2

Kofi Annan, Nobel Peace Lecture, at the Nobel Academy, Oslo, Norway December 10, 2001, *available at* http://www.nobel.se/peace/laureates/2001/annan-lecture.html (last visited July 6, 2004) 29

Letter from Juan Jose Bremer to Texas Board of Pardons and Paroles, May 3, 2002, *available at* www.abanet.org/crimjust/juvjus/beazleymexico02.html (last visited July 6, 2004) 24

Secretary Colin L. Powell, Remarks at the Briefing on the State Department's 2002 Country Reports on Human Rights Practices, Washington D.C., March 31 2003, *available at* http://www.state.gov/secretary/rm/2003/19218.htm (last visited July 6, 2004) 28

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STATEMENT OF *AMICI CURIAE* INTEREST

We, recipients of the Nobel Peace Prize, file this brief as *amici curiae* in support of Respondent, pursuant to Rule 37.3 of the Court.[1]

The Nobel Academy was established in 1901 and in accordance with the Statutes of the Nobel Foundation, prizes are awarded each year to those who, in the preceding year, have "conferred the greatest benefit to mankind" in the fields of physics, chemistry, medicine, literature, peace and economics. The Peace Prize is awarded to "the person who has the done the most or the best work for fraternity between nations, for the abolition of standing armies and for the holding and promotion of peace congresses."[2] Each of the *amici curiae* has been awarded the Nobel Peace Prize for efforts in advancing the principles of democracy and the protection of human rights worldwide. We have a continued interest in ensuring that internationally accepted standards of human rights and morality are respected by every nation.

The Nobel Peace Prize and its winners are a testament to the relevance of global opinion and practice in the area of human rights, and the importance of respecting internationally accepted standards of morality. *Amici curiae* have brought scores of human rights issues to the world's attention, resulting in the cessation of practices that violate human rights. Examples include the dismantling of

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[1] Letters of consent from both parties are on file with the Clerk of this Court. *Amici* have not received any contribution or support for this brief from either party, and no counsel for either party authored this brief in whole or in part. *Amici* have not received any monetary contribution to the submission of this brief.

[2] Statutes of the Nobel Foundation, ¶ 1.

apartheid in South Africa, the easing of tensions in Northern Ireland and the passing of the Ottawa Treaty banning the use of landmines. *Amici curiae* urge this Court to consider carefully the importance and relevance of respecting internationally accepted principles of human rights and morality. We have publicly stated our beliefs that "unconditional adherence to international law is essential" and that the "death penalty is . . . especially unconscionable when imposed on children."[3] When receiving his Nobel Peace Prize in 2002, President Jimmy Carter also reflected on the strength of these legal and moral concerns when he endorsed the international movement toward "prohibition of the death penalty, at least for children."[4]

SUMMARY OF ARGUMENT

At issue before this Court is whether the death penalty for a crime committed by a person under the age of eighteen constitutes "cruel and unusual punishment" in violation of the Eighth Amendment to the Constitution of the United States of America.

In order to answer this question this Court should consider the opinion of the international community, which has rejected the death penalty for child offenders worldwide. That opinion is exceptionally relevant when determining whether such a practice contradicts "evolving

[3] Final Statement of the Fourth World Summit of Nobel Peace Laureates, Rome, November 30, 2003; *available at* http://www.ippnw.org/NobelPeaceSummit2003.html.

[4] Jimmy Carter, Nobel Lecture at the Nobel Academy Dec. 10, 2002, *available at* http://www.nobel.se/peace/laureates/2002/carter-lecture.html (last visited June 30, 2004).

standards of decency that mark the progress of a maturing society."[5] This Court historically has considered internationally accepted standards of human rights and decency,[6] and especially should consider international standards in this case.

The prohibition on the death penalty for child offenders is widely recognized as a rule of customary international law, which has been defined as the "general and consistent practice of states followed by them from a sense of legal obligation."[7] "[S]tate practice is generally interpreted to mean official government conduct which would include state legislation, international and national judicial decisions, recitals in treaties and other international instruments, a pattern of treaties in the same form, the practice of international and regional governmental organizations, such as the United Nations and the Organization of American States and their organs, domestic policy statements, press releases and official manuals on legal questions."[8]

[5] *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

[6] *See, e.g.*, *Enmund v. Florida*, 458 U.S. 782, 796-797 n.22 (1982) (observing that felony murder doctrine had been eliminated or restricted in England, India, Canada, and a "number of other Commonwealth countries"); *Coker v. Georgia*, 433 U.S. 584, 596 n.10 (1977) (finding that only 3 of 60 nations surveyed in 1965 retained the death penalty for rape); *Trop*, 356 U.S. at 102-03 (finding that only 2 of 84 nations surveyed imposed denationalization as punishment for desertion).

[7] Restatement (Third) of the Foreign Relations Law of the United States § 102 (2) (1987); *see also* Statute of the International Court of Justice, June 26, 1945, art. 38, 59 Stat. 1055, 1060, T.S. 993.

[8] *Domingues v. United States*, Inter-Am. C.H.R., Report No. 62/02, Merits Case 12.285, October 22, 2002, at ¶ 47 (citing Asylum Case (Colum. v. Peru), 1950 I.C.J. 266, 276-77 (Nov. 30)).

State practice almost universally rejects the death penalty for child offenders. As a consequence, in a series of decisions against the United States, the Inter-American Commission on Human Rights has found that the customary international law bar on the juvenile death penalty has evolved to *jus cogens* status.[9] A *jus cogens* prohibition is a "rule[] of customary international law which cannot be set aside by treaty or acquiescence but only by the formation of a subsequent customary law of contrary effect."[10] A state that persistently objects to a customary international law rule usually may be held exempt from the rule, but all states are bound by *jus cogens* prohibitions because they "derive their status from fundamental values held by the international community" and violations of such prohibitions are "considered to shock the conscience of humankind."[11]

The unusual strength and clear definition of the international prohibition on the death penalty for offences committed by children under eighteen years old makes it particularly relevant to this Court's decision whether to

[9] *Domingues, supra*; *Beazley v. United States*, Inter-Am. C.H.R., Report No. 101/03, Merits Case 12.412, December 29, 2003; *Thomas v. United States*, Inter-Am. C.H.R., Report No. 100/03, Merits Case 12.240, December 29, 2003; *Graham v. United States*, Inter-Am. C.H.R., Report No. 97/03, Merits Case 11.193, December 29, 2003. In all three of the latter cases, wherein executions occurred, the Inter-American Commission recommends that the United States provide the next-of-kin with "an effective remedy, which includes compensation."

[10] *Domingues, supra*, at ¶ 49 (citing Vienna Convention on the Law of Treaties, *adopted* May 22, 1969, 1155 U.N.T.S. 331, UN Doc. A/CONF. 39/27, at arts. 53, 64).

[11] *Id.* (citing Barcelona Traction, Light & Power Co., Ltd. (Belgium v. Spain), Second Phase, 1970 I.C.J. 3, 32 (Feb. 5) (sep. op. Judge Ammoun)).

extend Eighth Amendment protection in this case.[12] This Court always has maintained that United States courts must construe domestic law so as to avoid violating principles of international law.[13] In particular, this Court has interpreted the fundamental law expressed in the constitutional guarantee of due process and prohibition on cruel and unusual punishment as protection against acts that, among the nations of the world, are "everywhere forbidden."[14]

[12] *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428 (1964) (noting that "the greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it"); *see* Jules Lobel, *The Limits of Constitutional Power: Conflicts between Foreign Policy and International Law*, 71 Va. L. Rev. 1071, 1075 (1985) (noting that "certain rules [which] have attained the status of fundamental international norms from which no derogation is permitted ... resemble constitutional principles ... [and] echo theories, prevalent at the founding of the American Republic, holding that the fundamental principles of the law of nations limited the constitutional power of a sovereign").

[13] *See, e.g.*, *The Apollon*, 22 U.S. (9 Wheat) 362, 370-71 (1824) ("It cannot be presumed that congress would voluntarily justify such a clear violation of the laws of nations."); *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 102, 118 (1804).

[14] *E.g.*, *Trop*, 356 U.S. at 102-03. Indeed, lower federal courts have recognized that a *jus cogens* norm may impose a restraint of constitutional dimension. *Committee of United States Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 941 (D.C. Cir. 1988) ("Such basic norms of international law ... may well restrain our government in the same way that the Constitution restrains it."); *Gisbert v. United States Attorney General*, 988 F.2d 1437, 1448 (5th Cir. 1993) (noting that *Reagan* raised, but did not decide, whether "doctrines of *jus cogens* supersede domestic law").

ARGUMENT

A. INTERNATIONAL HUMAN RIGHTS AND HUMANITARIAN LAW PROHIBITS THE DEATH PENALTY FOR CHILD OFFENDERS

The protection of human dignity is at the core of both international human rights law and the Eighth Amendment. This Court has said: "The basic concept underlying the Eighth Amendment is nothing less than the dignity of man."[15] Similarly, the preambles of many human rights treaties state that the concept of human dignity is the bedrock principle upon which human rights are based.[16] The fundamental right to human dignity grounds the rejection of the death penalty for child offenders in international law.[17]

Evidence for the rule barring the death penalty for child offenders includes, inter alia, treaty provisions, resolutions adopted by international bodies, jurisprudence of international courts and treaty bodies, and national

[15] *Trop*, 356 U.S. at 100.

[16] The Preamble of the International Covenant on Civil and Political Rights, to which the United States is a party, asserts that "these rights derive from the inherent dignity of the human person." International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368 (ratified by the United States June 8, 1992) [hereinafter ICCPR]. The Preamble to the Convention on the Rights of the Child recognizes "the inherent dignity and of the equal and unalienable rights of all members of the human family." United Nations Convention on the Rights of the Child, *adopted* Nov. 20, 1989, 1577 U.N.T.S. 3, 28 I.L.M. 1448 [hereinafter CRC]. *See also* Preamble to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted* Dec. 10, 1984, G.A. Res. 39/46, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984).

[17] *E.g.*, CRC, *supra*, at art. 37 (c). Within the same article prohibiting the juvenile death penalty the CRC requires, "Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person." *Id.*

level state practice. Such evidence is used by the International Court of Justice to determine "international custom, as evidence of a general practice accepted as law," under Article 38 of its Statute, which identifies the sources of law to decide cases.[18]

i) International treaties and resolutions illustrate that the death penalty for child offenders is contrary to internationally accepted standards of human rights.

A number of widely ratified multilateral human rights treaties prohibit the death penalty for child offenders. These include the *International Covenant on Civil and Political Rights* ("ICCPR"), the *American Convention on Human Rights* ("ACHR"),[19] the *United Nations Convention on the Rights of the Child* ("CRC"), and the *Geneva Convention Relative to the Protection of Civilian Persons in Time of War* ("Fourth Geneva Convention").[20]

The ICCPR, which has been ratified by 152 nations,[21] prohibits the death penalty for offenders under the age of eighteen. According to Article 4 of the ICCPR, parties may not "derogate" from this prohibition in Article 6(5)[22] even

[18] Statute of the International Court of Justice, *supra*, at art. 38.

[19] American Convention on Human Rights, Nov. 22, 1969, 1144 U.N.T.S. 123, 9 I.L.M. 673 [hereinafter ACHR].

[20] Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 3560, 75 U.N.T.S. 286 (ratified by the United States 1955).

[21] United Nations High Commissioner for Human Rights, *Status of Ratifications of the Principal International Human Rights Treaties, as of 09 June 2004*, at 12.

[22] ICCPR, *supra*, art. 6(5) ("Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age. . . .").

"in time of public emergency which threatens the life of a nation."[23] In 1978, President Carter submitted the ICCPR to the Senate for its advice and consent. Final ratification came in 1992, with a reservation to Article 6(5), which reads:

> The United States reserves the right, subject to its Constitutional restraints, to impose capital punishment on any person (other than a pregnant woman) duly convicted under existing or future laws permitting the imposition of capital punishment, including such punishment for crimes committed by persons below eighteen years of age.[24]

Eleven other parties to the ICCPR (Belgium, Denmark, Finland, France, Germany, Italy, the Netherlands, Norway, Portugal, Spain and Sweden) immediately entered formal objections to this reservation.[25] Subsequently, the United Nations Human Rights Committee, which the United States recognizes as competent to monitor ICCPR compliance,[26] declared the reservation to Article 6(5) "incompatible with the object and purpose of the Covenant" and asserted that it "deplored" state statutes in the

[23] ICCPR, *supra*, art. 4 (1) & (2).

[24] Senate Committee On Foreign Relations Report on the International Covenant on Civil and Political Rights, S. Exec. Report. No. 23, 102d Cong., 2d Sess. (1992) *reprinted in* 31 I.L.M. 645, 653-54 (1992).

[25] *Reservations, Declarations, Notifications and Objections relating to the International Covenant on Civil and Political Rights and the Optional Protocols thereto*, U.N. Doc. CCPR/C/2/Rev.4, Part D (1994).

[26] *Id.* at Part F ("The United States declares that it accepts the competence of the Human Rights Committee to receive and consider communications under article 41 in which a State party claims that another State party is not fulfilling its obligations under the Covenant.").

United States allowing the death penalty for "crimes committed by persons under 18."[27]

The ACHR, which has been ratified by 25 nations of the Western Hemisphere, also prohibits capital punishment for offenders under the age of eighteen. According to Article 27 of the ACHR, parties may not "derogate" from this prohibition in Article 4(5) even "[i]n time of war, public danger or other emergency that threatens the independence or security of a State Party."[28]

The CRC, which has been ratified by 192 nations, prohibits the death penalty for offenders under 18 in Article 37(a).[29] The United States and Somalia alone have not ratified the CRC. Somalia, however, has acceded to the ICCPR,[30] leaving the United States the only nation in the world that has not committed itself by treaty to bar the death penalty for offences committed by persons under 18.

Although the United States has not ratified the ACHR or the CRC, it has signed both treaties. According to Article 18(a) of the Vienna Convention on the Law of Treaties,[31] a provision which reflects customary international law,[32] signatories to treaties must not act in a

[27] *Concluding Observations of the Human Rights Committee: United States of America*, U.N. GAOR Hum. Rts. Comm., 50th Sess., ¶¶ 279, 292, U.N. Doc. CCPR/C/79/Add.50, A/50/40 (1995).

[28] ACHR, *supra*, art. 27 (1) & (2).

[29] CRC, *supra*, art. 37(a); *Status of Ratifications of the Principal International Human Rights Treaties, as of 09 June 2004*, *supra* at 12 (reporting 192 parties).

[30] *Id.* at 10 (reporting that Somalia acceded to the ICCPR on April 24, 1990).

[31] Vienna Convention on the Law of Treaties, *supra*, art. 18(a).

[32] Ian Brownlie, Principles of Public International Law 603 (3d ed., Oxford, Clarendon Press 1979).

manner that defeats the "object and purpose" of the treaty. By continuing to sentence child offenders to death, the United States is acting in a way that tends to defeat the object and purpose of the ACHR and the CRC.[33]

The Fourth Geneva Convention, which has been ratified by 192 nations,[34] also prohibits in Article 68 the death penalty for offences committed by persons under age 18 in occupied territories. At the time the United States ratified the Fourth Geneva Convention, it entered no reservation to Article 68.[35]

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[33] *Restrictions on the Death Penalty (Articles 4(2) and 4(4) American Convention on Human Rights*, Advisory Opinion No. OC-3/83 of Sept. 8, 1983, Inter-Am. Ct. H.R., ser. A: Judgments and Opinions, No. 3 (1983), *reprinted in* 23 I.L.M. 320, 341 (1984) (holding that reservations to "non-derogable fundamental rights" of the American Convention are inconsistent with the object and purpose of the treaty); Annual Report of the United Nations Committee on the Rights of the Child, U.N. GAOR, 51st Sess., Supp. No. 41, ¶ 183, U.N. Doc. A/51/41 (1996) (finding the "right to life" in Art. 6 to be one of the Convention's general principles).

[34] Department Federal des Affaires Etrangeres (Swiss), *Etats parties aux quatre Conventions de Geneve pour la protection des victims de la guerre*; link located at http://www.icrc.org/eng/party_gc (last visited July 10, 2004).

[35] William A. Schabas, *Invalid Reservations to the International Covenant on Civil and Political Rights: Is the United States Still a Party?*, 21 Brook. J. Int'l L. 277, 306 (1995). On December 23, 2002, the United States also ratified the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict without any reservations. The United States' reservation to Article 6(5) of the International Covenant is inconsistent with its commitment to Article 3(1) and other provisions within the Protocol based on the recognition that "persons under the age of 18 years are entitled to special protection." Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, U.N. GAOR, 54th Sess., Annex I, at arts. 3(1), 3(3), 4(1), 4(2), 6(3), U.N. Doc. A/RES/54/263 (2000).

Aside from conventional international law, which itself can be evidence of a customary international rule, international human rights bodies have adopted numerous resolutions and declarations calling for the abolition of the death penalty for child offenders.[36] Most recently, on April 20, 2004, the United Nations Commission on Human Rights adopted Resolution 2004/48 on the Rights of the Child, which *inter alia* "[c]alls upon" those "States in which the death penalty has not been abolished" "to abolish by law as soon as possible the death penalty for those aged under 18 at the time of the commission of the offence."[37] At the request of the representative of the United States of America, a recorded vote was taken on the resolution, which was adopted with 52 votes in favour, 1 against (United States of America) and no abstentions.[38]

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[36] *Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty*, E.S.C. Res. 1984/50, Annex, U.N. ESCOR Supp. No.1, at 33, U.N. Doc. E/1984/84 (1984); *United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules")*, Rule 17.2, G.A. res. 40/33, U.N. GAOR, 40th Sess., Supp. No. 53, at 207, U.N. Doc A/40/53 (1985); *The Question of the Death Penalty*, Comm. On Hum. Rts., 57th Sess., Resolution 2001/68, *adopted* April 25, 2001, E/CN.4/2001/RES/68 (2001); *The Question of the Death Penalty*, Comm. On. Hum. Rts., 56th Sess., Resolution 2000/65, *adopted* April 26, 2000, E/CN.4/RES/2000/65 (2000); *The Question of the Death Penalty*, Comm. On. Hum. Rts., 55th Sess., Resolution 1999/61, *adopted* April 28, 1999, E/CN.4/RES/1999/61 (1999).

[37] United Nations Commission on Human Rights, *Report to the Economic and Social Council on the Sixtieth Session of the Commission* (Draft Report), Res. 2004/48, *adopted* April 20, 2004, at 31 ¶ 35(a), U.N. Doc. E/CN.4/2004/L.11/Add.5.

[38] Explaining the vote prior to the vote, the Irish representative, speaking on behalf of the European Union and the Group of Latin American and Caribbean Countries, said no efforts had been spared in working toward a consensus resolution and announced that the groups considered the CRC "the standard in the promotion and protection of the rights of the child." United Nations Press Release, *Commission on*

(Continued on following page)

ii) The practice of other countries illustrates that the death penalty for child offenders is contrary to internationally accepted standards of human rights.

a) The practice of the British Commonwealth and Europe.

This Court repeatedly has examined the practices of countries sharing its Anglo-American heritage, as well as those of the European democracies, in the process of interpreting the United States Constitution.[39] The jurisprudence of the United States' legal predecessor, the United Kingdom, and the countries of the British Commonwealth is of particular relevance. Starting in 1887, executions of persons under eighteen were "virtually abolished" in the United Kingdom "by use of the royal prerogative of mercy."[40] In 1908, Parliament formally abolished the death penalty for persons under age sixteen (Children Act 1908, section 103), setting a norm roughly comparable to that in *Thompson v. Oklahoma*, 487 U.S.

Human Rights Adopts Resolutions on Rights of Women and Children, Specific Groups, Indigenous Issues, 20 April 2004 (at www.unhchr.ch). Also prior to the vote, the Argentinian representative asserted that "the objections stated by the United States were unacceptable." *Id.*

[39] *Thompson v. Oklahoma*, 487 U.S. 815, 830 (1988) (looking to "other nations that share our Anglo-American heritage" and "leading members of the Western European community"); *see also Enmund*, *supra* note 6; *Coker*, *supra* note 6; *Washington v. Glucksberg*, 521 U.S. 702, 710 n.8, 718-19 n.16 (1997) (surveying other nations' laws on assisted suicide); *Culombe v. Connecticut*, 367 U.S. 568, 583-84 n.25, 588 (1961) (looking at English interrogation practice); *Kilbourn v. Thompson*, 103 U.S. 168, 183-89 (1881) (referring to Parliament practices to determine whether House of Representatives had contempt power).

[40] Victor Bailey, *The Shadow of the Gallows: The Death Penalty and the British Labour Government, 1945-51*, 18 Law & Hist. Rev. 305, 305 n.1 (2000).

815 (1988) and *Stanford v. Kentucky*, 492 U.S. 361 (1989).[41] In 1933, Parliament again confirmed the actual cessation of executions of child offenders by raising the minimum age to eighteen on the date of sentencing.[42] In 1948, the death penalty was barred for persons who were under eighteen on the date when the offence was committed.[43] The bar on the death penalty for offenders under 18 spread within the British Commonwealth.[44]

In South Africa, during apartheid, national law prohibited the death sentence for offenders under age eighteen.[45] When South Africa completed the transition to full democracy, a new South African Constitution was adopted. The basic premise of its Bill of Rights is similar to that of the United States Constitution – it "enshrines . . . and affirms the democratic values of human dignity,

[41] The reforms represented in the Children Act were influenced by a "vast child-saving crusade sweeping across the United States," similar laws passed in France and Belgium, and efforts in Switzerland, Denmark, and Belgium. Sir Leon Radzinowicz and Roger Hood, *Judicial Discretion and Sentencing Standards: Victorian Attempts to Solve a Perennial Problem*, 127 U. Pa. L. Rev. 1288, 1327 (1979).

[42] *See* Bailey, *supra*, at 305 n.1. Children and Young Persons Act 1933 § 53(1) ("Death shall not be pronounced on . . . a person under age of 18 years.").

[43] Criminal Justice Act 1948 § 16 (repealed by Homicide Act 1957 § 17(2) & Sch. 2).

[44] Criminal Procedure (Amendment) Bill, 1952 (Hong Kong) (expressly adopting age definition of Criminal Justice Act 1948 § 16); *see* Hong Kong Legislative Council, Sittings, 1952 Session, Nov. 5 and 19, 1952 (http://www.legco.gov.hk/1952/h521105.pdf; http://www.legco.gov.hk/1952/h521119.pdf).

[45] *See* Section 277(3)(b) of Criminal Procedure Act No. 51 of 1977 (S. Afr.) ("The sentence of death shall not be imposed upon an accused who was under the age of 18 years at the time of the commission of the act which constituted the offense concerned.").

equality, and freedom."[46] In 1995, the Constitutional Court abolished the death penalty for all offences, holding that it was incompatible with the new constitution's rights to life and dignity.[47] The South African Constitution now explicitly incorporates the international legal definition of "child," affording numerous, specific, personal rights to children "under the age of 18 years."[48]

The United States' retention of the death penalty – and in particular for children – is of great concern to European nations, as reflected in recent demarches from the European Union and Council of Europe on the issue of children and the death penalty.[49] Even fifteen years ago, the European Court of Human Rights ruled that the extradition of an eighteen-year-old offender to the United States to face charges involving the death penalty would violate Article 3 of the European Convention on Human Rights,[50] which prohibits "torture or . . . inhuman or

[46] S. Afr. Const. ch. II, § 7.

[47] *State v. T. Makwanyane and M. Mchunu*, 1995 (3) SALR 391 (C.C.).

[48] S. Afr. Const. ch. II, § 28(3).

[49] European Union, *EU Demarche on the Death Penalty*, May 10, 2001 (presented by Swedish Presidency) (announcing EU clemency demarches in cases involving offenders under 18 and protesting that Article 6 of the ICCPR enshrines the minimum rules for the protection of the right to life); *Abolition of the Death Penalty in Council of Europe Observer States*, Council of Europe, Parliamentary Assembly, Report, Doc. 9908, 11 September 2003 (presented by Committee on Legal Affairs and Human Rights, Mrs. Renate Wohlwend, Rapporteur) ("[T]he execution of child offenders is not only a particularly heinous practice, but also clearly in violation of international law.").

[50] European Convention for the Protection of Human Rights and Fundamental Freedoms: Nov. 4, 1950, 213 U.N.T.S. 221, *entered into force*, Sept. 3, 1953.

degrading treatment or punishment" in part because of the youth of the defendant "at the time of the offence."[51]

b) The practice of the rest of the world.

A recent report by Nobel Peace Prize laureate Amnesty International, *The Exclusion of Child Offenders from the Death Penalty under General International Law*, documents the use of the juvenile death penalty worldwide.[52] Since 1990, only eight of the 191 United Nations member states are known to have inflicted the "ultimate punishment" on child offenders – Yemen, Nigeria, Pakistan, Saudi Arabia, Iran, the Democratic Republic of the Congo, China, and the United States of America. These eight countries have executed thirty-four child offenders. The United States alone is responsible for nineteen of those executions.[53] Four of the other seven nations have abolished the death penalty for child offenders. Of the remaining three, one has taken steps to abolish the death penalty for child offenders, one has commuted the death sentences of child offenders, and the other has denied that it executes child offenders.

[51] *Soering v. United Kingdom*, 11 Eur. Ct. H.R. 439, at ¶¶ 108, 109 (1989), *Guidelines to EU Policy Towards Third Countries on the Death Penalty*, adopted by the Council of the European Union, June 3, 1998; Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the Abolition of the Death Penalty, *opened for signature* April 28, 1983, E.T.S. 14 (*entered into force* March 1, 1985).

[52] Amnesty International, *The Exclusion of Child Offenders from the Death Penalty Under General International Law*, July 2003, AI Index: ACT 50/004/2003 (available by AI Index search at www.amnesty.org/library/index) [hereinafter Amnesty International, *Exclusion of Child Offenders*].

[53] *Id.*

In 1994, Yemen changed its laws to outlaw the execution of child offenders.[54] Nigeria has passed national legislation prohibiting the death penalty for offenders under 18 and has told the United Nations that its sole reported execution of a child, which took place in 1997, was not of a child.[55] In 2000, Pakistan prohibited the death penalty for child offenders in the Juvenile Justice System Ordinance.[56] Although a child offender was executed after the passing of the Ordinance, President Musharraf has since commuted the death sentences of a large number of others.[57] Saudi Arabia vehemently denies that it has executed child offenders, despite reports of such executions.[58]

Iran is home to the most recent recipient of the Nobel Peace Prize, Shirin Ebadi, who was awarded the prize in recognition of her struggle to protect the rights of women and children. Iran is also home to the latest efforts to eliminate the death penalty for child offenders. In December 2003, the Iranian Parliament approved a bill to abolish the death penalty for offenders under the age of eighteen.[59]

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[54] Scott Peterson, *Despite Islamic Law, Yemen Bans Teen Death Penalty*, Christian Sci. Monitor, Feb. 2, 2000.

[55] Summary Record of 6th Meeting of the Sub-Commission on the Promotion and Protection of Human Rights, 52nd Sess., at ¶ 39, U.N. Doc. E/CN.4/Sub.2/2000/SR.6 (2000).

[56] Amnesty International, *Exclusion of Child Offenders*, *supra* note 52, at Appendix 3 (Pakistan).

[57] *Id.* at Appendix 3 (Pakistan) (reporting 125 commutations); Pakistan News Service, *74 Get Relief Against Death Sentence* (July 25, 2002), *available at* http://paknews.com/flash.php?id=5&date1=2002-07-25 (last visited July 6, 2004).

[58] *See* Summary Record of the 53rd Meeting of the Commission on Human Rights, 56th Sess., April 17, 2000, at ¶¶ 88 and 92, U.N. Doc. E/CN.4/2000/SR.53 (2000).

[59] Amnesty International, *United States of America: Supreme Court to Revisit Constitutionality of Executing Child Offenders*, AMR

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Prior to the introduction of this legislation, Iran had denied executing child offenders, despite reports to the contrary.[60]

In January 2000, a fourteen-year-old child soldier was executed in the Democratic Republic of the Congo after proceedings before a military tribunal that did not meet internationally accepted standards for a fair trial. However, in 2001, after an appeal from the international community, four child offenders who had been sentenced to death by a Congolese military court had their death sentences commuted.[61]

In 1997, China – the world's leading executioner and seventh country among those known to have executed child offenders since 1990 – amended its Criminal Law to prohibit the death penalty for offenders under eighteen.[62]

51/020/2004, January 27, 2004 (also reporting execution of 17-year-old offender in Iran on January 25, 2004); *see* Reuters, *Iran to stop executions of 15-18 year olds*, The New Zealand Herald, Sept. 29, 2003, *available at* http://www.nzherald.co.nz/latestnewsstory.cfm?storyID=3526022&thesection=news&thesubsection=world (last visited July 6, 2004) (quoting secretary of Supreme Council for Judicial Development: "The new law fully complies with Sharia law and modern judicial developments.").

[60] U.N. Press Release, Commission on Human Rights Starts Debate on Specific Groups and Individuals, 11 April 2001, Right of Reply by Representative of Iran.

[61] Amnesty International, *Exclusion of Child Offenders*, *supra* note 52, *citing* U.N. Doc. E/CN.4/2002/74, ¶ 108.

[62] Criminal Law of the People's Republic of China, adopted by the Second Session of the Fifth National People's Congress on July 1, 1979, and amended by the Fifth Session of the Eighth National People's Congress on March 14, 1997, Chapter Three, Section Five, Article 49 ("The death penalty is not to be applied to persons who have not reached the age of eighteen at the time the crime is committed . . . "). Amnesty International has reported that, contrary to Chinese law, an execution of a child offender occurred in China in 2003. *See* Amnesty International, *United States of America: Supreme Court to Revisit Constitutionality of Executing Child Offenders*, *supra* note 59, at n.2.

Worldwide domestic law changes also include the following. After acceding to the CRC in 1991, Myanmar (Burma) passed a Child Law in 1993, prohibiting the death penalty for young offenders.[63] The law provides that "[n]o death sentence shall be passed on any child" and "[n]o death sentence shall be passed on a youth" respectively. Sections 2(a) and 2(b) define "child" as any person under sixteen and "youth" as any person between sixteen and eighteen.

In March 2003, the Thai Senate approved the first reading of a bill designed to formally abolish the death penalty for offenders under the age of eighteen.[64]

In August 2002, the Philippines Supreme Court commuted the death sentences of twelve child offenders, reasoning that, under the revised Philippine Penal Code, "minority" was deemed a "privileged circumstance which prevents the imposition of the death penalty."[65]

Clearly, "the world community considers the execution of offenders aged below eighteen years at the time of their offence to be inconsistent with prevailing standards of decency."[66] The United States is the only nation in the world that publicly condones the execution of child offenders.[67]

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[63] Child Law 1993 (Law No. 9/93, §§ 45 and 71 (enacted July 14, 1993) (Myan.).

[64] Mongkol Bangprapa, *Jail-term limits pass first vote – 50-year maximum penalty for minors*, The Bangkok Post, Mar. 14, 2003.

[65] Resolution of the Court En Banc, Luzviminda Puno, Supreme Court of the Philippines, O.C. No. 01-20, *Re: Letter of Ma. Victoria S. Diaz, Program Development Officer, Jesuit Prison Service*, dated July 30, 2002, filed Aug. 1, 2002, at 1.

[66] *Domingues*, *supra* note 8, at ¶ 84.

[67] The United States itself has pointed out that all but fourteen of the parties to the CRC have enacted domestic laws that conform to Article 37(a), which bars the death penalty for child offenders. *Domingues*, *supra* note 8, at ¶ 105.

iii) The prohibition of the death penalty for child offenders is increasingly recognized as *jus cogens*.

The exclusion of offenders under eighteen years old from the death penalty is so widely accepted in law and practice that it has become a rule of customary international law.[68] Furthermore, the Inter-American Commission on Human Rights recently declared that the worldwide rejection of the juvenile death penalty "has been recognized as being of a sufficiently indelible nature to now constitute a norm of *jus cogens*."[69] Norms of *jus cogens* "derive their status from fundamental values held by the international community, as violations of such peremptory norms are considered to shock the conscience of humankind and therefore bind the international community as a whole, irrespective of protest, recognition or acquiescence."[70] *Amici curiae* welcome the Inter-American Commission's conclusion, which reflects the nearly universal condemnation of execution of child offenders.

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[68] U.N. Sub-Commission on Human Rights Res. 2000/17, 26th mtg., U.N. Doc. E/CN.4/SUB.2/RES/2000/17 (2000) (the death penalty for offenders under 18 "is contrary to customary international law").

[69] *Domingues*, *supra* note 8, at ¶ 85; *accord Beazley*, *Thomas*, and *Graham*, *supra* note 9.

[70] *Domingues*, *supra* note 8, at ¶ 49.

B. APPLYING THE WORLD CONSENSUS AGAINST EXECUTING CHILD OFFENDERS FITS THIS COURT'S JURISPRUDENCE AND THE UNITED STATES' HISTORICAL COMMITMENT TO HUMAN RIGHTS.

i) This Court historically has considered the views of the world community to be relevant to Eighth and Fourteenth Amendment issues.

In a 1911 death penalty case involving a 17-year-old defendant, the Presiding Judge of the Texas Court of Criminal Appeals observed, "That the federal courts and government of the United States ha[ve] jurisdiction over cases arising under treaties and the law of nations . . . is not debatable. This doctrine has been upheld from the inception of our national life . . . and has never been seriously questioned in our judicial history."[71] The judge concluded, albeit in dissent, that the defendant's mob-driven trial had violated fundamental "rules of procedure applicable to the law of nations" and that, therefore, "his conviction and sentence were obtained without due process of law."[72]

The Texas judge accurately described this Court's recognition of the role of foreign and international law in federal constitutional jurisprudence. This Court long had recognized the wisdom of considering international

[71] *Ex parte Martinez*, 145 S.W. 959, 995, 1014-15 (Tex. Crim. App. 1912) (Davidson, P.J., dissenting) (citing *Miller v. The Resolution*, 2 U.S. (2 Dall.) 1 (1781) (Mem.); *The Estrella*, 17 U.S. (4 Wheat) 298 (1819) (Mem.); *United States v. Ortega*, 24 U.S. (11 Wheat) 467 (1826) (Mem.); *Blyew v. United States*, 80 U.S. (13 Wall.) 581 (1871) (Mem.); *Tenn v. Davis*, 100 U.S. 257 (1879) (Mem.); *Bors v. Preston*, 111 U.S. 252, 258 (1884); *Ames v. Kansas*, 111 U.S. 449, 467 (1884); *Hilton v. Guyot*, 159 U.S. 113 (1895); *La Abra Silver Mining Co. v. United States*, 175 U.S. 423 (1899); *The Paquete Habana*, 175 U.S. 677 (1900)).

[72] *Id.*

sources when interpreting the parameters of due process. For example, in 1884, this Court asserted in *Hurtado v. California*:

> The constitution of the United States was ordained, it is true by the descendents of Englishmen, who inherited the traditions of the English law and history; but it was made for an undefined and expanding future, and for a people gathered, and to be gathered, from many nations and of many tongues; and while we take just pride in the principles and institutions of the common law, we are not to forget that in lands where other systems of jurisprudence prevail, the ideas and processes of civil justice are also not unknown. . . . There is nothing in Magna Carta, rightly construed as a broad charter of public right and law, which ought to exclude the best ideas of all systems and of every age; and as it was the characteristic principle of the common law to draw its inspiration from every fountain of justice, we are not to assume that the sources of its supply have been exhausted.[73]

International law and foreign law, indeed, have "played a well-known role in the debates over the relationship between the Bill of Rights and the Fourteenth Amendment" and have contributed to this Court's understanding of substantive due process.[74] In *Palko v. Connecticut*, this Court interpreted "fundamental" rights under the Fourteenth Amendment in light of international practice as it

[73] *Hurtado v. California*, 110 U.S. 516, 531 (1884).

[74] Gerald L. Neuman, *The Uses of International Law in Constitutional Interpretation*, 98 Am. J. Int'l L. 82, 83 (2004); *see also* Harold Hongju Koh, *International Law as Part of Our Law*, 98 AJIL 43 (2004).

had in *Hurtado*, finding that such rights protect against harms of the sort that are "everywhere forbidden."[75]

The "cruel and unusual punishment" clause finds its origins in the English Declaration of Rights of 1689 and in the Magna Carta.[76] Like the due process clause, the cruel and unusual punishment clause protects fundamental rights, and this Court's investigation of practices that violate the clause embraces the idea that the Constitution was made for an undefined and expanding future. This Court announced its forward looking interpretation of the clause in *Weems v. United States*,[77] wherein it began to focus on "evolving standards of decency":

> Time works changes, brings into existence new conditions and purposes. Therefore a principle, to be vital, must be capable of wider application than the mischief which gave it birth. This is particularly true of constitutions. They are not ephemeral enactments, designed to meet passing occasions. They are, to use the words of Chief Justice Marshall, "designed to approach immortality as nearly as human institutions can approach it." The future is their care, and provision for events of good and bad tendencies of which no prophecy can be made. In the application of a constitution, therefore, our contemplation cannot be only of what has been, but of what may be.

[75] *Palko v. Connecticut*, 302 U.S. 319, 325 n.3 (1937) (examining British, continental European, and Roman law sources and determining that double jeopardy "is not everywhere forbidden") (citation omitted), *overruled by Benton v. Maryland*, 395 U.S. 784 (1969) (holding that, contrary to *Palko*, "double jeopardy" is "a fundamental ideal in our constitutional heritage").

[76] *Trop v. Dulles*, 356 U.S. 86, 100 (1958). The English Declaration of Rights reads, "That excessive Baile ought not to be required nor excessive Fines imposed nor cruell and unusuall Punishments inflicted." The English Declaration of Rights, Part V, Article X (1 Wm. & Mary, 2d Sess. (1689), c. 2). The protest against cruel treatment, also present in some American colonial laws, may extend back to 1583, when Sir Robert Beale allegedly attempted to assert such protection under the Magna Carta. *Furman v. Georgia*, 408 U.S. 238, 316 (1972) (Marshall, J., concurring).

[77] *Weems v. United States*, 217 U.S. 349, 373 (1910).

Notably, in *Weems*, this Court interpreted the cruel and unusual punishment clause of a *Philippine* statute enacted by the United States Congress during the United States' colonial administration of the Philippines. In doing so, however, it explored the meaning of the Eighth Amendment, upon which the Philippine statute was based.[78] This Court held that the clause represented a non-derogable "fundamental law." Recognizing that the United States needed to respect the customs and "even prejudices" of the Philippine people while it played the role of occupying power, this Court nevertheless held that such deference was limited in all places by "certain great principles of government . . . which were deemed 'essential to the rule of law and the maintenance of individual freedom,'" and the practical rules of government essential to the preservation of those principles.[79] This Court concluded that the prohibition on cruel and unusual punishment was such a principle and that it must be observed in the Philippine Islands "however [it] might conflict with the customs or laws of procedure with which they were familiar." The "'enlightened thought of the Philippine Islands' would come to appreciate" its importance.[80]

[78] *Id.* at 382, 383-84 (White, J., dissenting).

[79] *Id.* at 367 (referring to *Kepner v. United States*, 195 U.S. 100 (1900), and quoting instructions of the President to the Philippine Commission).

[80] *Id.* at 367-68.

In *Trop v. Dulles*,[81] this Court looked to the "enlightened thought" of the world to determine the evolving content of those ills against which the Eighth Amendment protected. This Court held that denationalization as punishment for crime violated the cruel and unusual punishment clause because of its severity (rendering the recipient stateless without "the right to have rights") and its global rejection. Surveying the "civilized nations of the world," this Court found that it was almost "everywhere forbidden."[82]

The death penalty for offenders under eighteen now is not only forbidden almost everywhere, but also condemned and vigorously protested in many places.[83] "Within the international community, the execution of child offenders [by the United States] is widely regarded as contrary to established norms of customary international law."[84] The Inter-American Commission has made a reasonable case that a non-derogable "fundamental law" has arisen clearly

[81] *Trop*, 356 U.S. at 102-03.

[82] *Id.* (noting that, out of 84 countries surveyed, only Turkey and the Philippines imposed denationalization as punishment).

[83] *See, e.g.*, United Nations Sub-Commission on the Promotion and Protection of Human Rights, *The death penalty in relation to juvenile offenders*, Resolution 2000/17 (asserting that "the imposition of the death penalty on those aged under 18 at the time of the commission of the offense is contrary to customary international law" and is "condemn[ed] unequivocally"); *Reservations, Declarations, Notifications and Objections relating to the International Covenant on Civil and Political Rights and the Optional Protocols thereto*, *supra*, at Part D (objections to the United States' reservation to Article 6; many asserting that Article 6 represents the minimum standard for protection of the right to life and the last [Sweden] complaining that "[r]eservations of this nature contribute to undermining the basis of international treaty law").

[84] Letter from Juan Jose Bremer to Texas Board of Pardons and Paroles, May 3, 2002, *available at* www.abanet.org/crimjust/juvjus/beazleymexico02.html (last visited July 6, 2004).

identifying an evil of the sort which the Eighth and Fourteenth Amendments also are designed to bar.[85]

This Court should be guided by its Eighth and Fourteenth[86] Amendment precedents to determine that United States standards of decency must meet the minimum normative threshold of world opinion and practice.[87] The customary international law norm places offenders under the age of eighteen "beyond the State's power to punish

[85] The last time this Court requested briefing on the *jus cogens* issue, the Clinton Administration argued it was not ripe for review, because "there [was] no other source of decisional law (such as decisions of the International Court of Justice) that this Court might find helpful in resolving the question whether the execution of a [child] offender violates a *jus cogens* norm." Brief for the United States as Amicus Curiae, *Domingues v. Nevada*, No. 98-8327, 1999 WL 33639524 (Oct. 4, 1999), at 19. This Court now has sufficient sources in the October 2002 decision by the Inter-American Commission in *Domingues v. United States*, *supra* note 8, and the Commission's three subsequent decisions on the *jus cogens* issue. *Beazley, Thomas, and Graham*, *supra* note 9.

[86] *See Stanford v. Kentucky*, 492 U.S. 361, 369 n.1 (1989) (finding that "the practices of other nations, particularly other democracies" could be "relevant to determining whether a practice [is] so implicit in the concept of ordered liberty that it occupies a place not merely in our mores, but, text permitting, in our Constitution as well"). Substantive due process protects both those rights essential to ordered liberty and those that set classes of defendants beyond the power of the state to punish. *Penry v. Lynaugh*, 492 U.S. 302, 329-30 (1989).

[87] *See Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242, 2249 n.21 (2002); *Lawrence v. Texas*, 123 S. Ct. 2472, 2481 (2003); *see also* House Judiciary Subcommittee on the Constitution, Appropriate Role of Foreign Judgments in the Interpretation of American Law, March 25, 2004, http://commdocs.house.gov/committees/judiciary/hju92673.000/hju92673_0f.htm ("Hearing Transcript" at Ramsey, page 96; last visited July 12, 2004) (statement of Prof. Michael Ramsey, ex-law clerk for Justice Scalia) (observing that bar on the juvenile death penalty is an example in which "foreign sources point unambiguously in one direction" and may be "truly dispositive as opposed to . . . buttress[ing this Court's] opinions arrived at for other reasons.").

with death."[88] Competing interests of federalism and separation of powers should fall away before the norm, because "[t]here is little societal interest in permitting the criminal process to rest at a point where it ought properly never to repose."[89]

ii) The United States has played a historically positive role in the worldwide development of fundamental human rights.

In the immediate aftermaths of the two World Wars, the United States aggressively led the development of

[88] *Penry*, 492 U.S. at 329-330.

[89] *Id.* (quoting *Mackey v. United States*, 401 U.S. 667, 675, 693 (1971) (Harlan, J., concurring in judgments in part and dissenting in part)). In 1980, the United States jointly sponsored a U.N. General Assembly resolution describing the ICCPR provision that bars the death penalty for child offenders, without qualification, as establishing the "minimum standard" for all member nations, not just those who had ratified the ICCPR. G.A. Res. 35/172, U.N. GAOR Supp. (No. 48) at 195, U.N. Doc. A/35/48 (1980). Congress has abolished the federal death penalty for offenders under 18. 18 U.S.C. § 3591. However, for years the Executive and Senate have deferred to the States in the treaty adoption process, following what they have described as a federalism understanding. *See, e.g.*, Louis Henkin, *Comment: U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 Amer. J. Int. L. 341 (1995) (explaining origin of the federalism understanding and other treaty modifications). In *Penry*, this Court held that such deference to the states (described as comity) is unwarranted when a fundamental norm places persons beyond the State's power to punish with death. *Penry*, 492 U.S. at 330. Given that deference afforded the States in the "federalism understanding" is the only discernable reason for the United States' Executive's continued protest against the customary international law norm and for its prior reservation to Article 6(5) of the ICCPR, *Penry* indicates that this Court should be able to directly incorporate the norm into its Eighth Amendment decision without concern about invading the foreign policy and treaty making powers of the other branches. *Contra* Brief for the United States as Amicus Curiae, *Domingues v. Nevada*, No. 98-8327 (October 1999) at 20.

multilateral institutions and treaties to protect fundamental norms on regional and world-wide levels. The world is indebted to the United States for its enthusiasm and vigor in setting the wheels of international human rights law in motion. *Amici* are humbled to have received the same prize as the esteemed U.S. statesmen, Woodrow Wilson and Cordell Hull. President Woodrow Wilson was awarded the Nobel Peace Prize in 1919 for his role in creating the League of Nations, and Secretary of State Cordell Hull was awarded the Nobel Peace Prize in 1945 for his role in the creation of the United Nations.[90]

Eleanor Roosevelt was a major participant in the drafting of the Universal Declaration of Human Rights.[91] Proclaimed in 1948, this groundbreaking document is widely considered to be the first instrument of modern international human rights law. Although not binding law, the Declaration paved the way for the development of several treaties protecting the rights of individuals worldwide.

The United States maintains its resolve on the universality of human rights. In March 2003, Secretary of State Colin Powell reiterated the "steadfast commitment of the United States to advance internationally accepted human rights principles worldwide." Powell also referred to President Bush's "solemn pledge that the United States [would] always stand for the non-negotiable demands of

[90] The preamble to the Charter of the United Nations reads: "to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small," U.N. Charter, Preamble.

[91] Universal Declaration of Human Rights, G.A. res. 217A (III), U.N. Doc A/810 (1948).

human dignity" when launching the United States' State Department's report on human rights in other countries.[92]

We commend the State Department for addressing the rights of foreign citizens, and welcome the United States' dedication to promoting internationally accepted standards of human rights worldwide. We ask this Court to apply these standards, utilizing the opinions of international tribunals commensurate with U.S. constitutionalism (i.e., the Inter-American Commission on Human Rights), when evaluating the decency of its own national practice of executing child offenders.

CONCLUSION

The importance of international law to the issue before this Court is clear. The views of the world community play a significant role in the redressing of human rights abuses. If the world had not spoken out against apartheid, it might still be in place in South Africa. If Northern Ireland had not accepted the help of the United States, the peace agreement might never have come about. If nations across the world had not united to adopt the Ottawa Treaty, the use of landmines would be much more widespread than it is today. Nowhere is international law and opinion more important than in the field of human rights and humanitarianism.

When accepting his Nobel Peace Prize in 2001, United Nations Secretary-General Kofi Annan spoke of the "Butterfly Effect" – the theory that, in the world of nature,

[92] Secretary Colin L. Powell, Remarks at the Briefing on the State Department's 2002 Country Reports on Human Rights Practices, Washington D.C., March 31, 2003, *available at* http://www.state.gov/secretary/rm/2003/19218.htm (last visited July 6, 2004).

a butterfly flapping its wings in the Amazon rainforest can generate a violent storm on the other side of the world. As Mr. Annan said, "Today, we realize, perhaps more than ever, that the world of human activity also has its own 'Butterfly Effect' – for better or for worse."[93]

By continuing to execute child offenders in violation of international norms, the United States is not just leaving itself open to charges of hypocrisy, but also is endangering the rights of many around the world. Countries whose human rights records are criticized by the United States have no incentive to improve their records when the United States fails to meet the most fundamental, base-line standards.[94]

Amici curiae respectfully ask this Court to consider the relevance of internationally accepted standards of human rights and morality when addressing the constitutionality of the juvenile death penalty, especially in light of the Inter-American Commission's conclusion that the prohibition on that punishment has achieved *jus cogens* status. Norms of international law, such as the prohibitions on genocide, slavery and torture, are not merely "foreign moods, fads, or fashions" that we are seeking to "impose on Americans."[95] They protect human dignity across all of our national frontiers.

[93] Kofi Annan, Nobel Peace Lecture at the Nobel Academy, Oslo, Norway Dec. 10, 2001, *available at* http://www.nobel.se/peace/laureates/2001/annan-lecture.html (last visited July 6, 2004).

[94] The United States State Department has labeled as generally "poor" the human rights records of six of the seven other nations which have executed child offenders since 1990. United States Department of State, 2003 Country Reports on Human Rights Practices, released February 2004, *available at* http://www.state.gov/g/drl/rls/hrrpt/2003/index.htm (last visited July 6, 2004) (describing the Congo, Nigeria, Saudi Arabia, and Pakistan as "remaining poor," Yemen as "improving," and Iran as "worsening").

[95] *Lawrence v. Texas*, 539 U.S. 558, 123 S. Ct. 2472, 2488, 2495 (2003) (Scalia, J., dissenting) (quoting *Foster v. Florida*, 537 U.S. 990, 123 S. Ct. 470, 470 n.* (2002) (Mem.)).

For these reasons, along with those outlined in Respondent's brief, Respondent's death sentence should be vacated because it violates internationally accepted standards of human rights and constitutes cruel and unusual punishment in violation of the Eighth Amendment to the Constitution of the United States of America.

Respectfully submitted,

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Dr. Joseph Rotblat
Archbishop Desmond Tutu
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Jody Williams
American Friends Service Committee
Amnesty International
International Physicians for the Prevention of Nuclear War
Pugwash Conferences on Science and World Affairs
(Nobel Peace Prize Winners)

APPENDIX

Amici curiae include representatives from North America, Central America, South America, Europe, and Africa.

American Friends Service Committee, United States of America, 1947

For its humanitarian work and its work to promote fraternity between nations.

Betty Williams, Northern Ireland, 1976

For her role in founding the Peace Movement of Northern Ireland.

Mairead Corrigan-Maguire, Northern Ireland, 1976

For her role in founding the Peace Movement of Northern Ireland.

Amnesty International, England, 1977

For its efforts ensuring the worldwide implementation of the principles enshrined in the Universal Declaration of Human Rights, 1948.

Adolfo Perez Esquivel, Argentina, 1980

For his work to promote human rights based on non-violent means throughout South America.

President Lech Walesa, Poland, 1983

For the leading role he played in the Solidarity movement, which brought many freedoms to the Polish people.

Archbishop Desmond Tutu, South Africa, 1984

For his role in leading South Africa to a peaceful means of solving the problem of apartheid.

International Physicians for the Prevention of Nuclear War, United States of America, 1985

For its work to prevent the outbreak of nuclear war.

President Oscar Arias Sanchez, Costa Rica, 1987

For his work to bring peace to Central America.

The 14th Dalai Lama (Tenzin Gyatso), Tibet, 1989

For his consistently non-violent struggle for the libration of Tibet and his reverence for all things living.

President Mikhail Gorbachev, Former U.S.S.R., 1990

For his role in bringing peace to East-West relations.

President Frederik Willem De Klerk, South Africa, 1993

For his work for the peaceful termination of the apartheid regime, and for laying the foundations for a new democrati South Africa.

Dr. Joseph Rotblat, United Kingdom, 1995

For his efforts to diminish the part played by nuclear arms in international politics and, in the longer run, to eliminate such arms.

Pugwash Conferences on Science and World Affairs, Canada 1995

For its efforts to diminish the part played by nuclear arms in international politics and, in the longer run, to eliminate such arms.

Jody Williams, United States of America, 1997

For her work mobilizing global opinion against the use of anti-personnel mines, culminating in the passing of the 1997 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (1997 Mine Ban Treaty).

President James Earl Carter, Jr., United States of America, 2002

For his efforts toward finding peaceful solutions to international conflicts, advancing democracy and human rights worldwide and promoting economic and social development.

Shirin Ebadi, Iran, 2003

For her efforts for democracy and human rights and her special focus on the struggle for the rights of women and children.

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IN THE

Supreme Court of the United States

DONALD P. ROPER, Superintendent,
Potosi Correctional Center,

Petitioner,

v.

CHRISTOPHER SIMMONS,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF MISSOURI

BRIEF OF THE COALITION FOR JUVENILE JUSTICE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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Bellotti v. Baird, 443 U.S. 622 (1979) 10

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In re Gault, 387 U.S. 1 (1967) 13, 14

Lockett v. Ohio, 438 U.S. 586 (1978) 16

McMann v. Richardson, 397 U.S. 759 (1970) 13

Penry v. Lynaugh, 492 U.S. 302 (1989) 16

Powell v. Alabama, 287 U.S. 45 (1932) 13

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Schall v. Martin, 467 U.S. 253 (1984) 10

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Simmons v. Roper, 112 S.W.3d 397 (Mo. 2003) ... 4, 16-17

Stanford v. Kentucky, 492 U.S. 361 (1989) 4, 6, 8, 10

Strickland v. Washington, 466 U.S. 668 (1984) 13

Thompson v. Oklahoma, 487 U.S. 815 (1988) .....
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Statutes:

42 U.S.C. § 5601(a)(11) 1

42 U.S.C. § 5633(f)(2) 3

42 U.S.C. § 5633(a)(11) 1

42 U.S.C. § 5633(a)(12) 1

42 U.S.C. § 5633(a)(13) 1

United States Constitution:

Fifth Amendment 5, 6, 15

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Eighth Amendment 5

Fourteenth Amendment 5, 6, 12

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Other Authorities:

CJJ, 1997 Annual Report, *false images? The News Media and Juvenile Crime* (1997) 16

CJJ, 1998 Annual Report, *A Celebration or a Wake? The Juvenile Court After 100 Years* (1998) 8, 9, 17

CJJ, 2002 Annual Report, *An Examination of the Practice of Trying and Sentencing Youth in Criminal Court* (2003) ..... *passim*

CJJ, *Death Penalty: Executing Young Offenders: Statement on Executing People who Have Committed Crimes as Minors*, http://www.juvjustice.org/resources/fs003.html (last visited June 22, 2004) 4

Rodney Cook, CJJ National Chairman, *Executing the Young: Iran, Congo and Texas*, N.Y. Times, June 3, 2002 4

David Doi, CJJ Executive Director, *Youth Violence Facts*, Wash. Post, Jan. 22, 2000 4

Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, N.C.L. Rev. 891 (2004) 15

Cited Authorities

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Thomas Grisso, *The Competence of Adolescents as Trial Defendants*, 3 Psychol. Pub. Pol'y & L. 3 (Mar. 1997)	11
Sandy Hodson, *Board Spares Killer's Life: Panel Grants Clemency Without Chance of Parole*, Augusta Chronicle (Georgia), Feb. 26, 2002	5
James N. Kourie, Annotation, *Mens Rea or Guilty Intent as Necessary Element of Offense of Contributing to Delinquency or Dependency of Minor*, 31 A.L.R.3d 848 (1970)	9
National Advisory Commission on Criminal Justice Standards and Goals, *Corrections* 247 (1973)	2
National Coalition of State Juvenile Justice Advisory Groups, *1992 Annual Report, Myths and Realities: Meeting the Challenge of Serious, Violent, and Chronic Juvenile Offenders* (1992)	7, 13, 21
Report by the President's Commission on Law Enforcement and Administration of Justice, *The Challenge of Crime in a Free Society* (1967)	14
S. Rep. No. 93-1011 (1974), *reprinted in* 1974 U.S.C.C.A.N. 5283	2
Twentieth Century Fund Task Force on Sentencing Policy Toward Young Offenders, *Confronting Youth Crime* (1978)	19

INTEREST OF THE *AMICUS CURIAE*[1]

Amicus, the Coalition for Juvenile Justice ("CJJ") is the national association of state advisory groups ("SAGs") on juvenile justice. Congress created the SAGs in the federal Juvenile Justice and Delinquency Prevention Act ("JJDPA") to further the legislation's purposes of protecting and rehabilitating juvenile delinquents[2] and "help[ing] delinquent youth return to a productive life." 42 U.S.C. § 5601(a)(11).

The JJDPA emphasizes the differences between juvenile and adult offenders. 42 U.S.C. §§ 5633(a)(11), (12), (13). So does its legislative history:

> "The United States has a long tradition of dealing differently with juveniles than with adults who are in difficulty with the law, in the hope that juveniles can be rechannelled into becoming law abiding citizens. However, many of the methods of dealing with juveniles in this country have come to be viewed either as counterproductive or as violations of the rights of children. Thus there is a pressing need for national standards to

1. The parties have consented to the filing of this brief and their letters of consent have been lodged with the clerk. Pursuant to Rule 37.6, we state that no counsel for a party has written this brief in whole or in part, and that no person or entity, other than *amicus* or its counsel, has made any monetary contribution to the preparation or submission of this brief.

2. In this brief, the word "juveniles" means those under age 18 when their crimes were committed, and the terms "juvenile death penalty" and "juvenile execution" mean the execution of those who were under age 18 at the time of their crimes.

improve the quality of juvenile contacts with the justice system."

S. Rep. No. 93-1011, at 25-26 (1974) (quoting National Advisory Commission on Criminal Justice Standards and Goals, *Corrections* 247 (1973)), *reprinted in* 1974 U.S.C.C.A.N. 5283, 5290.

The members of the SAGs mandated by the JJDPA are appointed by the Governor or chief executive of their states or territories, whose political views run the gamut from very liberal to very conservative. Members of CJJ's Board of SAG Chairs (or their designees) serve on the CJJ Board of Directors. Nearly every state and territory has a SAG representative on CJJ's Board.[3]

CJJ is a diverse organization, composed of juvenile justice experts from many different disciplines. A varied group of juveniles, prosecutors, business professionals, law enforcement officers, social workers, probation officers, health and mental health professionals, lawyers, judges, and many others sit on the CJJ Board.[4] Some of the juveniles

---

3. Of the fifty-six states and territories with State Advisory Groups, six currently choose not to be members of CJJ: California, Delaware, Maine, Nebraska, Ohio, and Texas.

4. For example, CJJ's recent past National Chairs include:

1999 – Chair of the North Carolina Governor's Crime Commission

2000 – Retired FBI Special Agent in Charge in Denver, Colorado

(Cont'd)

who participate have themselves been involved in the juvenile justice system. CJJ consists of state agency personnel working with those employed in the public sector.

The JJDPA defines CJJ's functions as:

- conducting an annual conference for the SAGs;
- "disseminating information, data, standards, advanced techniques, and program models";
- "reviewing Federal policies regarding juvenile justice and delinquency prevention"; and
- advising the Administrator of the Office of Juvenile Justice and Delinquency Prevention, Congress, and the President regarding juvenile justice issues and SAG perspectives.

42 U.S.C. § 5633(f)(2). In connection with those duties, CJJ has published Annual Reports, which survey current available research and provide information and recommendations about various topics relevant to juvenile justice issues. CJJ also holds training conferences and provides information to SAGs.

(Cont'd)

2001 – Retired Juvenile Court Judge and past President of National Council of Juvenile and Family Court Judges

2002 – Executive Director of Clackamas County Commission on Children and Families in Oregon

2003 – Supervisor of South Carolina Vocational and Rehabilitation Department

2004 – City Attorney in Burlington, Vermont

As noted by the Missouri Supreme Court, in the wake of *Stanford v. Kentucky*, 492 U.S. 361 (1989), CJJ has become part of the growing "national consensus" against executing juveniles for crimes committed before their eighteenth birthday. *Simmons v. Roper*, 112 S.W.3d 397, 410 (Mo. 2003). Specifically, in 1989, CJJ's Board of Directors unanimously adopted a resolution opposing the execution of individuals for crimes committed before their eighteenth birthday.[5] In 1992, CJJ supported the United Nations Convention on the Rights of the Child, largely because it would bar the execution of juvenile offenders. In 1994, CJJ expanded its 1989 resolution into a Position Paper that appeared in several subsequent CJJ Reference Directories given to all CJJ members.

In 2000 and 2002, respectively, CJJ wrote letters to the editors of the Washington Post and the New York Times, advocating against the execution of juvenile offenders. David Doi, CJJ Executive Director, *Youth Violence Facts*, Wash. Post, Jan. 22, 2000, at A18; Rodney Cook, CJJ National Chairman, *Executing the Young: Iran, Congo and Texas*, N.Y. Times, June 3, 2002, at A14. Specifically, the 2002 letter expressed CJJ's support for the Missouri Supreme Court's decision setting aside Christopher Simmons' death sentence. Also in 2002, Linda Hayes, the CJJ representative from North Carolina, and David Doi, CJJ's Executive Director, testified before the Georgia Board of Pardons and Parole on behalf of Alexander E. Williams, a death row inmate who had

5. "CJJ opposes the death penalty for any individual whose offense was committed before the age of 18." CJJ, *Death Penalty: Executing Young Offenders: Statement on Executing People who Have Committed Crimes as Minors*, http://www.juvjustice.org/resources/fs003.html (last visited June 22, 2004).

committed his crime at age 17. After the hearing, Williams' sentence was commuted to life in prison.[6]

SUMMARY OF ARGUMENT

The death penalty, as applied to those who were under age 18 when their crimes were committed, violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution. Like the mentally retarded, juveniles have developmental limitations and deficiencies that make them less able to assist counsel, more prone to making false confessions, and more likely to be wrongfully convicted or wrongfully sentenced to death. As this Court held in *Atkins v. Virginia*, 536 U.S. 304, 317 (2002), these characteristics "undermine the strength of the procedural protections that our capital jurisprudence steadfastly guards." This Court should reach the same conclusion here and categorically exclude juveniles from the death penalty.

Moreover, juveniles do not always receive the heightened procedural prctections this Court has deemed necessary to save the death penalty from unconstitutionality as "cruel and unusual" punishment. In fact, juveniles, despite being less culpable because of their deficiencies, often receive less procedural protection in capital trials than the average adult offender. Finally, the execution of juvenile offenders serves neither of the death penalty's stated goals of retribution or deterrence. Juveniles' reduced capacity makes them less

6. *See* Sandy Hodson, *Board Spares Killer's Life: Panel Grants Clemency Without Chance of Parole*, Augusta Chronicle (Georgia), Feb. 26, 2002, at A01 (also noting that CJJ, the National Mental Health Association, and the European Union were among those requesting clemency).

culpable offenders and keeps them from appreciating fully the consequences of their actions.

ARGUMENT[7]

I. Capital Trials In Adult Courts Impermissibly Endanger Fundamental Constitutional Rights Of Juveniles.

Atkins categorically excluded the mentally retarded from the death penalty. 536 U.S. at 317-21. This Court found that the mentally retarded faced an unacceptable risk of wrongful execution and that such a severe sanction did not materially advance the death penalty's societal purposes of retribution and deterrence. *Id.* Research conducted since this Court addressed the execution of juveniles in *Stanford* shows that, like the mentally retarded, juveniles also should be categorically excluded from execution, because they suffer from many of the same deficiencies as mentally retarded defendants, making them unable to utilize the basic constitutional protections and procedural safeguards of the Fifth, Sixth, and Fourteenth Amendments.

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7. CJJ does not here repeat, but does adopt, the Eighth Amendment arguments that will likely appear in the briefs for Respondent and Respondent's *amici*. As those submissions will undoubtedly point out, there is now a "national consensus" against executing those who were under age 18 when they committed their crimes, a consensus found not yet to have formed when the Court decided *Stanford* in 1989. This consensus is consistent with the fact that the reduced capacity of juvenile offenders increases the possibility of false confessions and contributes to the juveniles' lessened ability to give meaningful assistance to their counsel and make a persuasive showing of mitigation, all of which heighten the risk of wrongful execution.

For example, both juveniles and the mentally retarded have deficiencies in their reasoning and judgment faculties, and in their ability to control impulses. These deficiencies: (1) make it much more difficult, and often impossible, for them to assist their counsel or manage their own defense, denying their Sixth Amendment right to counsel; (2) create a heightened risk that they will falsely confess, denying them their Fifth Amendment right against self-incrimination; and (3) create a heightened risk of overly harsh sentencing. These characteristics of juveniles, like the characteristics of the mentally retarded, "undermine the strength of the procedural protections that our capital jurisprudence steadfastly guards," *Atkins*, 536 U.S. at 317, and weaken the protections the Fifth and Sixth Amendments should provide juveniles.

Any erosion of procedural rights should not be countenanced when the penalty is death. "When a defendant's life is at stake, the Court has been particularly sensitive to insure that every safeguard is observed." *Gregg v. Georgia*, 428 U.S. 153, 187 (1976). In addition, CJJ's research reveals that children and youth require even more due process protections than adults, and that such protections need to be afforded in a timely and effective fashion. National Coalition of State Juvenile Justice Advisory Groups, 1992 Annual Report, *Myths and Realities: Meeting the Challenge of Serious, Violent, and Chronic Juvenile Offenders* 38 (1992) ("CJJ 1992 Ann. Rep.").[8] Yet, as explained below, juveniles' deficiencies, like those of the mentally retarded, effectively deny them fundamental constitutional protections.

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8. CJJ was previously called the National Coalition of State Juvenile Justice Advisory Groups.

A. Post-*Stanford* Research Shows That Juveniles, Like The Mentally Retarded, Have Developmental Deficiencies.

Research conducted after *Stanford* was decided demonstrates that there are critical physical, mental, and emotional differences between youth and adults, particularly in their ability to make decisions and to understand the long-term repercussions of their actions. CJJ, 2002 Annual Report, *An Examination of the Practice of Trying and Sentencing Youth in Criminal Court* 14-16 (2003) ("CJJ 2002 Ann. Rep.").

In its 1998 Annual Report on the juvenile court system, CJJ examined the differences between children and adults in the context of American civil laws. CJJ, 1998 Annual Report, *A Celebration or a Wake? The Juvenile Court After 100 Years* 43 (1998) ("CJJ 1998 Ann. Rep."). "Children and youth are deemed less responsible and mature than adults in many areas of everyday life. They must attend school pursuant to compulsory attendance laws, and they are protected from the harmful actions of their custodians by abuse and neglect laws." *Id.* Like school and abuse and neglect laws, "[c]hild labor laws acknowledge [children's] vulnerability in the work place, and movie and television rating systems likewise recognize their susceptibility to immoral or violent influences. We still take children and youth to pediatricians instead of internists, and we accept that their . . . health needs are quite different from adults." *Id.*

CJJ also noted that children "are held less accountable for their actions in many other areas of law — they can't hold property in their own names, or make wills, or enter into enforceable contracts, or enter the military on their own,

or vote." *Id.* "Why should we expect them to be fully accountable as though they were fully formed and developed adults for their irresponsible acts in the juvenile or criminal arenas?" *Id.*

American criminal law also recognizes the distinct differences between juveniles and adults. For example, "all states have enacted legislation of some form . . . mak[ing] it either a misdemeanor or a felony to aid, encourage, or cause any child under a specified age to become or remain delinquent, neglected, or dependent." James N. Kourie, Annotation, *Mens Rea or Guilty Intent as Necessary Element of Offense of Contributing to Delinquency or Dependency of Minor*, 31 A.L.R.3d 848, 850-51 (1970) (footnotes omitted). These types of laws recognize that juveniles are less developed, in many ways, than adults.

According to developmental experts relied upon by CJJ in its extensive review of the literature on this issue, juvenile offenders fail to comprehend the long-term consequences and effects of their actions and decisions. CJJ 1998 Ann. Rep. at 43. Indeed, CJJ's reports show that "[c]ertain parts of the brain — particularly the frontal lobe and the cable of nerves connecting both sides of the brain — are not fully formed in many adolescents, contributing to a large extent to teenage impulsivity and mood swings." CJJ 2002 Ann. Rep., *supra*, at 15. In addition, recent neurological studies show that during adolescence, the brain undergoes a period of massive reorganization, as explained by author and psychologist Michael J. Bradley:

> "[T]he most critical part of the brain develops 95 percent of its capacity in adolescence — it doesn't even begin to develop until you hit 11 or 12, and

> it doesn't finish until you're 19 or 20. It's the part that has to do with making good judgments, moral and ethical decisions, and reining in impulsive behavior."

Id. (citation omitted).

The post-*Stanford* research that illustrates the specific disabilities and other limiting characteristics of juveniles is consistent with the traditional view of juveniles in American jurisprudence. More than two decades ago, Justice Powell, writing for the majority in *Eddings v. Oklahoma*, stated that "'adolescents . . . are more vulnerable, more impulsive, and less self-disciplined than adults.'" 455 U.S. 104, 115 n.11 (1982) (citation omitted). As Justice Powell went on to observe:

> [Y]outh is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage. Our history is replete with laws and judicial recognition that minors, especially in their earlier years, generally are less mature and responsible than adults. Particularly "during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment" expected of adults.

Id. at 115-16 (citing *Bellotti v. Baird*, 443 U.S. 622, 635 (1979)) (footnotes omitted); *see also Schall v. Martin*, 467 U.S. 253, 265 n.15 (1984) ("'Our society recognizes that juveniles in general are in the earlier stages of their emotional growth, that their intellectual development is incomplete, that they have had only limited practical experience, and that their

value systems have not yet been clearly identified or firmly adopted.'").

Juveniles' recognized limitations, which provide the basis for treating them differently under many civil laws, do not disappear when juveniles enter an adult criminal court. The diminished capacity of juveniles mirrors the limitations of the mentally retarded, and, we submit, likewise "undermine[s] the strength of the procedural protections that our capital jurisprudence steadfastly guards." *Atkins*, 536 U.S. at 317. The concerns this Court expressed about procedural safeguards in *Atkins* are equally relevant to juveniles and should lead this Court, as they did in *Atkins*, to exclude juveniles categorically from execution.

B. Because Of Their Deficiencies, Juveniles Effectively Are Denied Their Sixth Amendment Right To Counsel.

Like the mentally retarded, juveniles "may be less able to give meaningful assistance to their counsel." *Id.* at 320. The diminished capacity of juveniles directly affects their ability to communicate with and direct their counsel, as well as their faculty for making important trial and procedural decisions. Many adolescent defendants, because of their relationship with authority and their developmental process, either do not perceive their attorney as being on their side or fail to give their attorney information about the charges against them out of mistrust. Thomas Grisso, *The Competence of Adolescents as Trial Defendants*, 3 Psychol. Pub. Pol'y & L. 3, 15-17 (Mar. 1997). Juveniles' immature communication skills may also interfere with their ability to assist counsel. *Id.* at 16-17.

As CJJ noted in its 2002 Annual Report (at 15, 16):

- Juveniles' brain structure and cognitive ability may result in impaired judgment, hindering them throughout the legal process, particularly in a system designed for adults.

- Throughout the legal process, juveniles may experience difficulty comprehending "legal procedures and the consequences of various legal choices." With plea bargaining, for example, juveniles may not fully consider the implications of having a criminal record in favor of opting for the deal that will send them home the fastest.

- Juveniles may not understand the charges against them or what various legal rights mean, report relevant facts, or fully comprehend their counsel's role.

These impairments are further compounded by developmental delays, undiagnosed depression, attention deficit disorder or attention deficit hyperactivity disorder, learning disabilities, and/or mental illness, which commonly are found in juvenile offenders. *See id.* If an adolescent cannot cooperate with, effectively assist, and even direct her attorney in the preparation of her defense, she is effectively denied not only the right to counsel, but many other trial rights as well, such as the right to confront witnesses and the right to a jury trial.

The right to counsel is guaranteed by the Sixth Amendment to the U.S. Constitution and applied to the states through the Fourteenth Amendment. *Gideon v. Wainwright*,

372 U.S. 335, 342-43 (1963). "Whether it is a minor or an adult who stands accused, the lawyer is the one person to whom society as a whole looks as the protector of the legal rights of that person in his dealings with the police and the courts." *Fare v. Michael C.*, 442 U.S. 707, 719 (1979).

This Court's jurisprudence recognizes "the unique role the lawyer plays in the adversary system of criminal justice in this country." *Id.*; *see also, e.g., Gideon*, 372 U.S. at 344-45; *Powell v. Alabama*, 287 U.S. 45, 67-68 (1932). It is not just the presence of counsel that is necessary for a fair trial, but "'the effective assistance of counsel.'" *Strickland v. Washington*, 466 U.S. 668, 686 (1984) (quoting *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970)).[9]

Juveniles have special needs for assistance in the legal process, as recognized by the movement in the United States to create separate, special courts for juveniles.

> The juvenile needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it. The child "requires the guiding hand of counsel at every step in the proceedings against him."

In re Gault, 387 U.S. 1, 36 (1967) (quoting *Powell*, 287 U.S. at 69) (footnote omitted).

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9. There are serious inadequacies in the delivery of effective legal services to juvenile offenders, however. Indeed, many juveniles are denied the right to counsel in juvenile courts, while others receive only perfunctory representation from counsel assigned to represent their interests. CJJ 1992 Ann. Rep., *supra*, at 38.

As the Court further explained in *In re Gault*:

"The presence of an independent legal representative of the child, or of his parent, is the keystone of the whole structure of guarantees that a minimum system of procedural justice requires. The rights to confront one's accusers, to cross-examine witnesses, to present evidence and testimony of one's own, to be unaffected by prejudicial and unreliable evidence, to participate meaningfully in the dispositional decision, to take an appeal have substantial meaning for the overwhelming majority of persons brought before the juvenile court only if they are provided with competent lawyers who can invoke those rights effectively. The most informal and well-intentioned of judicial proceedings are technical; few adults without legal training can influence or even understand them; certainly children cannot. Papers are drawn and charges expressed in legal language. Events follow one another in a manner that appears arbitrary and confusing to the uninitiated. Decisions, unexplained, appear too official to challenge."

Id. at 38 n.65 (quoting Report by the President's Commission on Law Enforcement and Administration of Justice, *The Challenge of Crime in a Free Society* 86-87 (1967)). *In re Gault* held that juveniles were constitutionally entitled to counsel and other procedural safeguards in delinquency proceedings. *Id.* at 41-42. Such concerns are significantly heightened when the juvenile appears in the adult criminal court, especially when the sentence could be death.

C. These Deficiencies Cause Juveniles Effectively To Be Denied The Fifth Amendment Right Against Self-Incrimination.

Juveniles, like the mentally retarded, have many difficulties in all aspects of the legal process — beginning with the police interrogation. CJJ's research reveals that juveniles are more likely, because of their immaturity, to make a false confession. CJJ 2002 Ann. Rep., *supra*, at 15-16. In addition, recent research has found that

> juvenile suspects share many of the same characteristics as the developmentally disabled, notably their eagerness to comply with adult authority figures, impulsivity, immature judgment, and inability to recognize and weigh risks in decision-making, and [they] appear to be at a greater risk of falsely confessing when subjected to psychological interrogation techniques.

Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. Rev. 891, 1005 (2004). For example, "one of the most common reasons cited by teenage false confessors is the belief that by confessing, they would be able to go home." *Id.* at 969.

This heightened risk of false confessions also creates an increased risk of wrongful conviction. "Interrogation-induced false confessions may lead to wrongful conviction either when a suspect pleads guilty to avoid an anticipated harsher punishment or when a judge or jury convicts the false confessor at trial." *Id.* at 960.

D. Juveniles Face An Impermissible Risk Of Overly Harsh Sentencing In Capital Trials Due To Their Difficulties In Showing Mitigating Factors.

Like the mentally retarded, juveniles "are typically poor witnesses, and their demeanor may create an unwarranted impression of lack of remorse for their crimes." *Atkins*, 536 U.S. at 321. Many adults have a negative perception of juveniles and feel particularly threatened by juvenile offenders. CJJ, 1997 Annual Report, *false images? The News Media and Juvenile Crime* 8-9 (1997). Thus, juveniles also face the "risk 'that the death penalty will be imposed in spite of factors which may call for a less severe penalty.'" *Atkins*, 536 U.S. at 320 (citing *Lockett v. Ohio*, 438 U.S. 586, 605 (1978)). This Court has acknowledged "the importance of treating the defendant's youth as a mitigating factor in capital cases." *Thompson v. Oklahoma*, 487 U.S. 815, 834 (1988).

The trial in this case illustrates the point. As this Court noted in *Atkins*, "reliance on mental retardation as a mitigating factor ~~can be~~ a two-edged sword that may enhance the likelihood that the aggravating factor of future dangerousness will be found by the jury." *Atkins*, 536 U.S. at 321 (citing *Penry v. Lynaugh*, 492 U.S. 302, 323-25 (1989)). During the respondent's trial, the prosecutor made that very argument:

> In mitigation, the defense talked about 17-year-olds and their inability to think about the future, and about the fact that a person of 17 cannot vote or lawfully drink alcohol, but can be subject to the death penalty. The prosecutor used Simmons' age to argue that he should be put to death. The prosecutor's argument was: "Think about age. Seventeen years old. Isn't that scary? Doesn't that scare you? Mitigating? Quite the contrary I submit. Quite the contrary." The prosecutor seems to have implied that if Simmons was this bad at 17, he could only get worse.

Simmons, 112 S.W.3d at 416 (Wolff, J., concurring). Indeed, like the mentally retarded, juveniles have a "lesser ability . . . to make a persuasive showing of mitigation in the face of prosecutorial evidence of one or more aggravating factors." *Atkins*, 536 U.S. at 320. Juveniles "have had less time to develop ties to the community, less time to perform mitigating good works, and less time to develop a stable work history, than is true of adult offenders." *Simmons*, 112 S.W.3d at 413.

E. When Juveniles Are Defendants, The Heightened Procedural Standards Required In Capital Cases Are Not Met Due To These Deficiencies.

This Court has held that "the Eighth Amendment requires States to apply special procedural safeguards when they seek the death penalty. Otherwise, the constitutional prohibition against 'cruel and unusual punishments' would forbid its use." *Ring v. Arizona*, 536 U.S. 584, 614 (2002). CJJ's research reveals that children and youth require even more due process protections than adults. CJJ 1998 Ann. Rep., *supra*, at 43.

However, juveniles effectively receive fewer procedural protections than adults in capital trials. For that reason, capital punishment is "cruel and unusual" as applied to juveniles.

II. The Execution Of Juvenile Offenders Fails To Serve The Purposes Of The Death Penalty And Contravenes The Goals Of The Juvenile Justice System.

As demonstrated above, juveniles' developmental deficiencies preclude them from exercising fundamental constitutional rights and place them at an unacceptable risk of wrongful execution. We now show that the Court's death penalty jurisprudence provides a second reason to exclude juveniles categorically from execution: imposing the death penalty on such offenders does not measurably advance either of the death penalty's goals of "retribution and deterrence of capital crimes by prospective offenders." *Gregg*, 428 U.S. at 183; *see also Atkins*, 536 U.S. at 318-19.

A. Because Juveniles Are Less Culpable Than Adults, Juveniles' Execution Does Not Measurably Advance The Retributive Purpose Of The Death Penalty.

Like the mentally retarded, the diminished capacity of juveniles "diminish[es] their personal culpability." *Atkins*, 536 U.S. at 318. Therefore, retribution is not well served by executing juveniles, as they are not as culpable as adults. As this Court has recognized:

> [W]e assume that [children] do not yet act as adults do, and thus we act in their interest by restricting certain choices that we feel they are not yet ready to make with full benefit of the costs and benefits attending such decisions. It would be ironic if these assumptions that we so readily make about children as a class —about their inherent difference from adults in their capacity as agents, as choosers, as shapers of their own

> lives — were suddenly unavailable in determining whether it is cruel and unusual to treat children the same as adults for purposes of inflicting capital punishment.

Thompson, 487 U.S. at 825 n.23; *see also Eddings*, 455 U.S. at 114-15.

Since *Gregg*, the Court's jurisprudence has consistently narrowed the class of persons subject to the death penalty to those most deserving of execution, finding that the severity of the appropriate punishment necessarily depends on the offender's culpability. *Atkins*, 536 U.S. at 319. If the average adult murderer's culpability is insufficient to justify the imposition of the death penalty, as the Court reasoned in *Atkins*, then the lesser culpability of the juvenile offender surely does not justify it.

> "Crimes committed by youths may be just as harmful to victims as those committed by older persons, but they deserve less punishment because adolescents may have less capacity to control their conduct and to think in long-range terms than adults. Moreover, youth crime as such is not exclusively the offender's fault; offenses by the young also represent a failure of family, school, and the social system, which share responsibility for the development of America's youth."

Eddings, 455 U.S. at 115 n.11 (quoting Twentieth Century Fund Task Force on Sentencing Policy Toward Young Offenders, *Confronting Youth Crime* 7 (1978)).

Juveniles and the mentally retarded similarly lack the same degree of moral culpability as fully functioning adults due to their cognitive impairments and impulsivity. Juveniles are considered "less morally, ethically and cognitively developed in much the same way that adult offenders with developmental delays and brain damage are sometimes seen by the court as less legally responsible for their actions." CJJ 2002 Ann. Rep., *supra*, at 15. In this way, juveniles are much like the mentally retarded; juveniles often have "significant limitations in adaptive skills such as communication, self-care, and self-direction" and "diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others." *Atkins*, 536 U.S. at 318.

B. The Same Impairments That Make Juveniles Less Morally Culpable Also Lessen Their Ability To Appreciate Any Deterrent Effect; Therefore, Their Execution Does Not Measurably Advance The Deterrent Purpose Of The Death Penalty.

Juveniles' lesser ability to appreciate consequences and see the long-term impact of their decisions makes them poor candidates for deterrence. As this Court pointed out in *Atkins*:

> The theory of deterrence in capital sentencing is predicated upon the notion that the increased severity of the punishment will inhibit criminal actors from carrying out murderous conduct. Yet it is the same cognitive and behavioral impairments that make these defendants less morally culpable . . . that also make it less likely that they can process the information of the possibility of execution as a

> penalty and, as a result, control their conduct based upon that information.

Id. at 320.

In addition, the juvenile death penalty has been so rarely applied in the last decade that it would be highly unlikely that 16 or 17 year olds would seriously consider the possibility of execution as a possible consequence of their criminal behavior. *Thompson*, 487 U.S. at 837 (discussing the lack of a deterrent effect due to the infrequency of executions of those age 15 and under). It is truly an "unusual" punishment for juveniles.

In short, the execution of juvenile offenders "ignores the substantial evidence of the greater vulnerability and impulsivity of youth and of the false sense of omnipotence and immortality that many juveniles have." CJJ 1992 Ann. Rep., *supra*, at 27. Because the execution of juvenile offenders fails to "measurably contribute[]" to either deterrence or retribution, the death penalty under such circumstances is "nothing more than the purposeless and needless imposition of pain and suffering" and hence an unconstitutional punishment. *Coker v. Georgia*, 433 U.S. 584, 592 (1977).

CONCLUSION

For the reasons stated above, and in the briefs for Respondent and the *amici curiae* supporting Respondent, the judgment of the Missouri Supreme Court should be affirmed.

Respectfully submitted,

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In The

Supreme Court of the United States

DONALD P. ROPER, Superintendent,

Petitioner,

v.

CHRISTOPHER SIMMONS,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Missouri

BRIEF OF THE CONSTITUTION PROJECT AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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INTEREST OF AMICUS CURIAE

The Constitution Project, based at Georgetown University's Public Policy Institute, is a bipartisan organization that seeks solutions to contemporary constitutional issues. In May 2000, it convened thirty members of a blue ribbon committee to examine capital punishment in this country. This diverse committee includes supporters and opponents of the death penalty, Democrats and Republicans, former judges, prosecutors, defense lawyers, victim advocates, and other concerned Americans. Although The Constitution Project does not oppose the death penalty, it recommends an exemption for defendants who were under the age of 18 at the time of the crime. In the opinion below, the Supreme Court of Missouri identified The Constitution Project as one of many groups whose views are "consistent with the legislative and other evidence that current standards of decency do not permit the imposition of the death penalty on juveniles." *Simmons v. Roper*, 112 S.W.3d 397, 411 (Mo. 2003) (en banc).[1]

SUMMARY OF ARGUMENT

The court below correctly held that the execution of a person who was less than 18 at the time of the crime is cruel and unusual punishment prohibited by the Eighth Amendment because it offends contemporary standards of

[1] No counsel for a party authored this brief in whole or in part, and no person or entity other than amicus curiae and its counsel made any monetary contribution toward the preparation or submission of this brief. Letters of consent to the filing of this brief have been lodged with the Clerk pursuant to Rule 37.3.

decency and cannot be reconciled with fundamental tenets of our capital jurisprudence.

Much has changed since the Court last considered this issue fifteen years ago in *Stanford v. Kentucky*, 492 U.S. 361 (1989). For example, several weeks after the Court decided *Stanford*, the first exoneration based on DNA evidence occurred. Each year there has been a steady increase in the number of exonerations, and recent studies show that there is a significantly higher percentage of false confessions among young people. As a result of these and other developments, many more Americans such as this amicus curiae now oppose the execution of juveniles. The position of The Constitution Project is significant because this bipartisan organization presents a nationwide view shared by an extremely diverse cross-segment of the American population that includes those with experience as homicide prosecutors and victim advocates among others.

Not long ago, the Court concluded that mentally retarded persons should be exempt from the death penalty because of the prevailing view in our society that they, as a group, do not act with the level of moral culpability that characterizes the most serious adult criminal conduct. *Atkins v. Virginia*, 536 U.S. 304 (2002). The reasoning embraced by the Court in *Atkins* also supports a categorical exemption for persons who were less than 18 at the time of the crime. As a class, adolescent offenders lack the responsibility and culpability of adult criminals. Further, their lack of maturity and experience hinders their ability to defend themselves on an individual basis. The Constitution Project submits that, in light of the elevated and wholly unacceptable risk of error facing juvenile defendants, the holding

below is necessary to preserve the integrity of our capital jurisprudence.

ARGUMENT

I. "THERE IS SOME AGE BELOW WHICH A JUVENILE'S CRIMES CAN NEVER BE CONSTITUTIONALLY PUNISHED BY DEATH"

Not long ago, the Court concluded that mentally retarded persons should be exempt from the death penalty because of the prevailing view in our society that they, as a group, do not act with the level of moral culpability that characterizes the most serious adult criminal conduct. *Atkins v. Virginia*, 536 U.S. 304, 306-307 (2002). This holding is compelled not only by current standards of decency, but also by two independent tenets of Eighth Amendment law: (1) the narrowing doctrine, which seeks to ensure that only the most deserving of execution are put to death, and (2) the reliability requirement, which safeguards against executing people who have been wrongfully convicted or sentenced. *Id.* at 319-321. Mental retardation poses an enhanced risk of wrongful execution because this impairment, as a practical matter, often impedes or even counteracts attempts to present mitigating evidence on an individual basis. *Id.* at 320-321.

The Court has applied similar reasoning to exempt a 15 year old from the death penalty despite the heinous nature of his crime. *Thompson v. Oklahoma*, 487 U.S. 815 (1988) (plurality opinion). "Given the lesser culpability of the juvenile offender, the teenager's capacity for growth, and society's fiduciary obligations to children," the execution of the juvenile offender would not serve either of the

goals of the death penalty, retribution and deterrence. *Id.* at 836-837. Accordingly, the plurality opinion in *Thompson* found that the execution of the 15 year old would be "'nothing more than the purposeless and needless imposition of pain and suffering,' *Coker v. Georgia,* 433 U.S. at 592, and thus an unconstitutional punishment." *Thompson,* 487 U.S. at 838.

The parallels between the *Atkins* and *Thompson* cases are obvious. Like the mentally retarded defendant in *Atkins*, the 15 year old in *Thompson* lacked the level of moral responsibility expected of an adult. He was an adolescent – susceptible to impulse and influence, not fully developed emotionally or intellectually. The *Thompson* opinion recognized a "broad agreement" that adolescents "as a class" are less mature and responsible than adults. *Id.* at 834. "'Crimes committed by youths may be just as harmful to victims as those committed by older persons, but they deserve less punishment because adolescents may have less capacity to control their conduct and to think in long-range terms than adults.'" *Id.* (quoting 1978 Report of the Twentieth Century Fund Task Force on Sentencing Policy Toward Young Offenders). The same traits that undermined the retribution justification for the death penalty in *Atkins* and *Thompson* undermined the deterrence goal as well.

The common experience of parents throughout America bears witness to the "broad agreement" acknowledged in the plurality opinion in *Thompson*. A teenager's lack of maturity usually is accompanied by a countervailing capacity for growth. To the relief of all, most eventually emerge from the trying years of adolescence with the ability to function in society as responsible adults – a characteristic they lacked only a few years earlier.

In *Thompson*, the plurality declined to consider whether the Eighth Amendment bars the execution of 16 and 17 year olds because the case raised the issue only with respect to a 15 year old. *Id.* at 838. The next year, a bare majority of the Court found that, at that time, there was insufficient objective evidence of a national consensus against executing 16 and 17 year olds and that, therefore, the Eighth Amendment did not prohibit their execution. *Stanford v. Kentucky,* 492 U.S. 361 (1989). This issue, however, must be revisited over time. *Id.* at 381-382 (O'Connor, J., concurring). Indeed, regarding the *Thompson* decision, Justice O'Connor observed: "[t]he plurality and dissent agree on two fundamental propositions: that there is some age below which a juvenile's crimes can never be constitutionally punished by death, and that our precedents require us to locate this age in light of the 'evolving standards of decency that mark the progress of a maturing society.'" *Thompson*, 487 U.S. at 848 (O'Connor, J., concurring).

These fundamental propositions support the Missouri Supreme Court's ruling in this case. Today, the age for a constitutional death penalty cannot be less than 18 because there is a consensus in America that juveniles under this age, as a class, lack the responsibility and moral culpability of adult criminals that are necessary to render them death eligible.

II. CONTEMPORARY STANDARDS OF DECENCY DECRY THE EXECUTION OF A PERSON WHO WAS YOUNGER THAN 18 AT THE TIME OF THE CRIME

Our American society is not the same as it was in 1988 and 1989 when the Court issued the *Thompson* and

Stanford decisions. There have been enormous developments in the area of capital punishment. When *Stanford* was decided, the alternatives to capital punishment were more limited. In the 1990's, many states added the option of life without parole. *See* Jeffrey L. Kirchum, *Another Place Beyond Here: The Death Penalty Moratorium Movement in the United States,* 73 U. Co. L. R. 1, 66-67 (2002). Studies show that support for the death penalty drops significantly when life without parole is available as an alternative sentence. *Id. See also Simmons v. South Carolina,* 512 U.S. 154, 177 (1994) (O'Connor, J., concurring) (noting recent rejection of parole).

Of equal significance is the introduction of DNA evidence into the administration of justice. Several weeks after the Court decided *Stanford*, the first prisoner in American history was exonerated by DNA evidence. *See* Samuel R. Gross, Kristen Jacoby, Daniel Matheson, Nicholas Montgomery, and Sujata Patel, *Exonerations in the United States, 1989 Through 2003* (April 19, 2004) *available at* http://www.law.umich.edu/newsandinfo/exonerations-in-us.pdf (last visited July 14, 2004). There has been a steady increase in exonerations in recent years, and more than 70 death row inmates have been exonerated since 1989. *Id.* at 4, 6, 8. *See generally* Bureau of Statistics, U.S. Dept. of Justice, Pub. No. 197020, Capital Punishment 2001 (2002), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/cp01.pdf.

Due in part to the upward trend in exonerations and the unavoidable fact that teenagers as a group lack the maturity and responsibility expected of an adult, more Americans now oppose the execution of defendants who were under the age of 18 at the time of the crime. *Simmons v. Roper,* 112 S.W.3d 397 (Mo. 2003). As the court

below observed, since *Stanford*, additional respected American organizations have called for an end to the juvenile death penalty. *Id.* at 410-411. Among those expressly identified by the Missouri Supreme Court is The Constitution Project. *Id.* at 410.

The Constitution Project is not a radical group. It is a mainstream organization that approaches constitutional issues, such as the one in this case, with input from both Democrats and Republicans, conservatives and liberals, prosecutors and defense lawyers, as well as other interested Americans such as victim advocates, journalists, scholars, former judges, and others. It adheres to the view that individuals who commit violent crimes deserve swift and certain punishment, and does not categorically oppose the death penalty.

In May 2000, the Constitution Project convened a committee to examine capital punishment in this country. The co-chairs are Charles F. Baird, former Judge, Court of Criminal Appeals of the State of Texas; Gerald Kogan, former Chief Justice, Supreme Court of the State of Florida and former Chief Prosecutor, Homicide and Capital Crimes Division, Dade County, Florida; and Beth A. Wilkinson, Prosecutor, Oklahoma City bombing case. The members of the committee also are distinguished, and brought to the table varied backgrounds and perspectives.[2]

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[2] The director of The Constitution Project's death penalty initiative is Virginia E. Sloan. Its members are: The Reverend James E. Andrews, Stated Clerk (retired), Presbyterian Church (U.S.A.); The Honorable Harry Barnes, Jr., former U.S. ambassador to Romania, India, and Chile; The Honorable Charles B. Blackmar, former Chief Justice, Supreme Court of Missouri; William G. Broaddus, former Attorney General, Commonwealth of Virginia; David I. Bruck, Capital Defense

(Continued on following page)

Counsel; The Honorable Robert J. Burns, retired Judge, Jefferson Parish, Louisiana; Rosalynn Carter, Vice Chair of The Carter Center; W. J. Michael Cody, former Attorney General, State of Tennessee; The Honorable Mario M. Cuomo, former Governor, State of New York; The Honorable John J. Gibbons, former Chief Judge, U.S. Court of Appeals for the Third Circuit; Thomas A. Gottschalk, General Counsel, General Motors Corporation; Charles A. Gruber, former President, International Association of Chiefs of Police; Cardinal William H. Keeler, Archbishop of Baltimore; Paula M. Kurland, Victim Advocate and Office Manager, Crime Prevention Institute; David Lawrence, Jr., President, Early Childhood Initiative Foundation and former Publisher, Miami Herald and Detroit Free Press; The Honorable Abner J. Mikva, former Member of Congress (D-IL), former Chief Judge, U.S. Court of Appeals for the D.C. Circuit, and former White House Counsel, Clinton administration; Sam D. Millsap, Jr., former District Attorney, Bexar County, San Antonio, Texas; The Honorable Sheila M. Murphy, former Judge, Sixth District, State of Illinois and Executive Director, Illinois Death Penalty Education Project; Dr. LeRoy Riddick, Forensic Pathologist; Chase Riveland, former Secretary, Department of Corrections, State of Washington; Laurie O. Robinson, President, CSR, Inc., Senior Fellow, Crime Policy Program, University of Pennsylvania, Jerry Lee Center of Criminology, and former Assistant Attorney General, Office of Justice Programs, U.S. Department of Justice, Clinton administration; The Honorable Kurt L. Schmoke, former Mayor, City of Baltimore, Maryland, former State's Attorney, State of Maryland, and Dean, Howard University Law School; The Honorable William S. Sessions, Director, Federal Bureau of Investigation, Reagan and Bush administrations and former Chief Judge, U.S. District Court for the Western District of Texas; G. Elaine Smith, Past President, American Baptist Churches, USA; B. Frank Stokes, Jr., Special Agent, FBI, Retired and Private Investigator; Jennifer Thompson, Spokesperson, Center on Wrongful Convictions; Scott Turow, Partner, Sonnenschein Nath & Rosenthal; The Honorable Vin Weber, former Member of Congress (R-MN); John W. Whitehead, President, The Rutherford Institute; Rabbi Eric H. Yoffie, President, Union of American Hebrew Congregations. Individual member biographies can be found at http://www.constitutionproject.org/dpi/members.html. The Committee's Reporters are Professor Susan Bandes, DePaul University College of Law, Chicago, IL; Professor Robert P. Mosteller, Duke University School of Law, Durham, NC; Professor Stephen Saltzburg, The George Washington University Law School, Washington, DC.

The members of this death penalty initiative disagree on much, including whether capital punishment should be abolished. They are united, however, in their concern that procedural safeguards and other assurances of fundamental fairness in the administration of the death penalty are deeply flawed. They note the dramatic recent increase in the number of persons who have been released from death row because they were shown – often at nearly the last minute – to have been wrongfully convicted.

The work of the committee culminated in the publication of The Constitution Project, *Mandatory Justice, Eighteen Reforms to the Death Penalty* (2001) ("the Report"), *available* at http://www.constitutionproject.org/dpi/ (last visited July 14, 2004). The Report's recommendations are particularly significant because they represent a compilation of a nationwide view shared by an extremely diverse cross-segment of the American population. Among other things, the Report recommends an exemption from the death penalty for people who face an unacceptable risk of wrongful execution, including the mentally retarded and juveniles under the age of 18 at the time of the crime.

The Report presents compelling findings in support of its recommendations. First, it points out that there is "a strong and growing consensus" that executing juveniles serves no acceptable purpose. Report at 13. "A child or adolescent generally does not possess the level of moral responsibility and culpability that society expects of an adult. Juveniles are particularly unlikely to be deterred by the specter of punishment." *Id.* at 14. As for retribution, "'such irreversible giving up upon a person even before they emerge from childhood is squarely in opposition to the fundamental premises of juvenile justice in comparable socio-legal systems.'" *Id.* (quoting American Bar

Association, Report of the Section of Criminal Justice, reprinted in Reports of the American Bar Association 990 (1983)).

Of even more concern is the increased risk of error in juvenile cases. Noting recent examples of false confessions in cases involving juvenile defendants and the problems associated with allowing juries to weigh age as a mitigating factor, the Report concludes that an individual approach to the death penalty does not adequately address the risk of an erroneous sentence with this class of defendant. *Id.*

The Missouri Supreme Court noted that the *Thompson* and *Atkins* opinions looked to the views of organizations such as The Constitution Project to assess "evolving standards of decency." *Simmons*, 112 S.W.3d at 411. This Court should do the same, and conclude that contemporary standards of decency decry the execution of someone who was less than 18 at the time of the crime.

III. BEDROCK PRINCIPLES OF CAPITAL JURISPRUDENCE ALSO REQUIRE A CATEGORICAL EXEMPTION FOR JUVENILES UNDER 18

The existence of a national consensus, however, is not necessary for an affirmance because bedrock principles of capital jurisprudence require a categorical exemption for juveniles under the age of 18. In *Atkins*, the Court found two independent grounds for the exclusion of the mentally retarded: (1) the narrowing doctrine; and (2) the special risk of wrongful execution facing this class of defendant. The same grounds support the decision below.

The Report of The Constitution Project explains why constitutional law requires a categorical rule barring the execution of both mentally retarded and juvenile offenders under 18 regardless of a national consensus on the issue.

> [T]he argument for a categorical rule does not rest on the existence of a national consensus . . .
>
> The death penalty is meant to be reserved for the most morally culpable offenders . . .
>
> The risks of executing those undeserving of death, and of cutting short a life that could hold promise, are simply too great, and outweigh the possibility that some juveniles may be among the most heinous and depraved murderers. . . .
>
> As discussed above in regard to persons with mental retardation, allowing juries to weigh age as a mitigating factor against aggravating factors such as the seriousness of the crime does not adequately address the risk of an erroneous sentence.

Report at 12-14.

Like The Constitution Project, the *Atkins* Court could not ignore "the fact that in recent years a disturbing number of inmates on death row have been exonerated." 536 U.S. at 320 n.25. Studies published within the last few months have shown that there is a significantly higher percentage of false confessions among young people than the population at large. *See Exonerations in the United States, 1989 Through 2003* at 19-20; Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World,* 82 N.C. L. Rev. 891, 963 (2004). Further, there are a number of documented instances of false

murder confessions obtained from teenagers over the age of 15. *See, e.g., id.* at 966-68, 974-77.

In sum, because of the elevated and unacceptable risk of error facing juveniles, the death penalty age limit recommended by The Constitution Project is necessary to preserve the integrity of our capital jurisprudence. The Supreme Court of Missouri, therefore, correctly held that the Eighth Amendment prohibits the execution of people who were under the age of 18 at the time of the crime.

CONCLUSION

The Court should affirm.

Respectfully submitted,

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No. 03-633

JUL 12 2004

In The Supreme Court of the United States

DONALD P. ROPER,
Superintendent, Potosi Correctional Center,

Petitioner,

v.

CHRISTOPHER SIMMONS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF MISSOURI

BRIEF OF *AMICI CURIAE* THE EUROPEAN UNION AND MEMBERS OF THE INTERNATIONAL COMMUNITY IN SUPPORT OF RESPONDENT

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CAPITAL CASE

QUESTION PRESENTED FOR REVIEW

Whether there is an international consensus against the execution of persons below 18 years of age at the time of the commission of the offense.

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TABLE OF AUTHORITIES

Cases:

Atkins v. Virginia, 536 U.S. 304 (2002) 7

Coker v. Georgia, 433 U.S. 584 (1977) 7

Domingues v. United States, Report No. 62/02, Case 12.285, OEA/Ser.L/V/II.116, Doc. 33, Oct. 22, 2002 available at <http://www.cidh.org/annualrep/2002eng/USA.12285.htm> 19, 20

Douglas Christopher Thomas v. United States, Report No. 100/03, Case No. 12.240, Dec. 29, 2003 available at <http://www.cidh.org/annualrep/2003eng/USA.12240.htm> 21

Edwards et al. v. The Bahamas, Report No. 48/01, Cases 12.067, 12.068, 12.086 (Apr. 4, 2001) 19

Enmund v. Florida, 458 U.S. 782 (1982) 7

Garza v. United States, Inter-Am. C.H.R. 1255, OEA/ser.L/V/II.111, doc. 20 rev. (2001) 19

Gary Graham v. United States, Report No. 97/03, Case No. 11.193, Dec. 29, 2003 available at <http://www.cidh.org/annualrep/2003eng/USA.11193.htm> 21

Lawrence v. Texas, 123 S.Ct. 2472 (2003) 7, 8

Maria v. McElroy, 68 F. Supp. 2d 206 (E.D.N.Y 1999) 15

Napoleon Beazley v. United States, Report No. 101/03, Merits Case 12.412, Dec. 29, 2003 available at <http://www.cidh.org/annualrep/2003eng/USA.12 412.htm> 21

Pinkerton and Roach v. United States, Resolution No. 3/87, Case 9647, Inter-Am. Cm. H.R., Annual Report of the Inter-American Commission on Human Rights 1986-1987 147, OES/Ser.L/V/II/71, doc. 9, rev. 1 (1987) 19

Stanford v. Kentucky, 492 U.S. 361 (1989) 8, 26

Thompson v. Oklahoma, 487 U.S. 815 (1988) 7

Trop v. Dulles, 356 U.S. 86 (1958) 7

United States v. Bakeas, 987 F. Supp. 44 (D. Mass. 1997) 15

United States v. Benitez, 28 F. Supp. 2d 1361 (S.D. Fla. 1998) 15

United States v. Duarte-Acero, 208 F.3d 1282 (11th Cir. 2000) 15

Treaties and Other Legal Instruments:

African Charter on the Rights and Welfare of the Child, OAU Doc. CAB/LEG/24.9/49 (1990) 18

American Convention on Human Rights, Ch. II, art. 4, § 5, OASTS No. 36; OAS OFF Rec. OEA/SER L/V/INTERNATIONAL LAW.23 Doc. 21 Rev. 6 (1979) 4, 18, 19

American Declaration on the Rights and Duties of Man, O.A.S. Res. XXX, adopted by the Ninth International Conference of American States (1948) 19

Arab Charter on Human Rights, adopted Sept. 15, 1994, *reprinted in* 18 Hum. Rts. L.J. 151 (1997) 18

Fourth Geneva Convention (Relative to the Protection of Civilian Persons in Time of War), 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287 (1949) 4, 21

International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976 ..... 3, 14, 15, 17, 23

Protocol No. 6 to the European Convention on Human Rights concerning the Abolition of the Death Penalty 18

Protocol No. 13 to the European Convention on Human Rights concerning the Abolition of the Death Penalty 18

United Nations Convention on the Rights of the Child, G.A. Res. 1386 (XIV), 14 U.N. GAOR Supp. (No. 16) at 19, U.N. Doc. A/4354 (1959) 4, 12, 13, 14, 23

Vienna Convention on the Law of Treaties, S. Exec. Doc. No. 92-1, 92nd Cong., 1st Sess. (1974)..... 13

Vienna Convention on the Law of Treaties, U.N. Doc. A/Conf.39/27 (1969), 1155 U.N.T.S. 331, *reprinted* in 8 I.L.M. 679 (1969)..... 4, 5, 12, 13, 14, 20

Miscellaneous:

Advisory Opinion No. OC-10/90, *Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights*, Inter-Am. Ct. H.R., Ser. A, No. 10 (1989)..... 19

Amnesty International, *Children and the Death Penalty, Executions Worldwide Since 1990*, AI Index: ACT 50/007/2002, (Sept. 25, 2002) 9

Amnesty International, *Democratic Republic of Congo: Killing Human Decency*, AI Index: AFR 62/07/00, (May 31, 2000) 10

Amnesty International, *United States of America: Indecent and Internationally Illegal: The Death Penalty Against Child Offenders*, AI Index: AMR 51/143/2002, (Sept. 2002)..... 8, 18

Amnesty International, *Execution of Child Offenders: Updated Summary of Cases*, (Feb.16, 2004), *at* <http://news.amnesty.org/mav/index/ENGPOL300062004> 11

Amnesty International, *Pakistan: Young offenders taken off death row*, AI Index: ASA 33/029/2001, (Dec. 13, 2001)..... 11

Amnesty International, *Which Countries Still Use the Death Penalty against Child Offenders?* visited on June 21, 2004, *at* <http://www.amnestyusa.org/abolish/juveniles/countries.html> 11

Amnesty International, *Yemen: Ratification Without Implementation: the State of Human Rights in Yemen*, AI Index, MDE 31/01/97 (Mar. 1997) 9

Consideration of Reports Submitted by State Parties Under Article 40 of the Covenant, Comments on the United States of America, U.N. Hum. Rts. Comm., 53d Sess., 1413th mtg., U.N. Doc. CCPR/C/79/Add.50 (1995) 17

Council of Europe, *Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the Abolition of the Death Penalty*, CETS No.: 114, June 21, 2004, *at* <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=114&CM=&DF=&CL=ENG> 18

Council of Europe, *Convention for the Protection of Human Rights and Fundamental Freedoms*, CETS No.: 005, June 21, 2004, *at* <http://conventions.coe.int/treaty/Commun/ChercheSig.asp?NT=005&CM=&DF=&CL=ENG> 18

Council of Europe, *Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the abolition of the death penalty in all circumstances*, CETS No.: 187, June 21, 2004, *at* <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=187&CM=1&DF=&CL=ENG> 18

Declarations recognizing the competence of the Human Rights Committee under Article 41, *Multilateral Treaties Deposited With the Secretary General, Status as of 31 December 1994*, U.N. Doc. ST/LEG/SER.E/13 at 133 (1995) 15

European Union, *EU Policy and Action on the Death Penalty, at* <http://www.eurunion.org/legislat/DeathPenalty/deathpenhome.htm#ActiononUSDeathRowCases> 2

European Union, *Guidelines to EU Policy Towards Third Countries on the Death Penalty* (June 3, 1998), *at* <http://www.eurunion.org/legislat/deathPenalty/Guidelines.htm> 2

General Comment Adopted by the Human Rights Committee Under Article 40, Paragraph 4, of the International Covenant on Civil and Political Rights, Addendum, Hum. Rts. Comm., General Comment No. 24 (52), U.N. Doc. CCPR/C/21/Rev.1/Add.6 (1994) 15, 16, 17, 25, 26

Harold Hongju Koh, *A United States Foreign Policy for the 21st Century*, 46 St. Louis U. L.J. 293 (2002) 26, 27

International Justice Project, *US Juvenile Executions Since 1976*, Mar. 2004, *at* <http://www.internationaljusticeproject.org/juvStats.cfm> 9

International Justice Project, *Reported Worldwide Executions of Juveniles Since 1990*, last visited on June 1, 2004, *at* <http://www.internationaljusticeproject.org/juvWorld.cfm> 9

Office of the United Nations High Commissioner for Human Rights, *Convention on the Rights of the Child: United States of America*, visited on June 21, 2004, *at* <http://www.unhchr.ch/tbs/doc.nsf/887ff7374eb89574c1256a2a0027ba1f/815f8bc03a4089f3c1256b67006555ea?OpenDocument> 12

Office of the United Nations High Commissioner for Human Rights, *Convention on the Rights of the Child: Somalia*, visited on June 21, 2004, *at* <http://www.unhchr.ch/tbs/doc.nsf/22b020de61f10ba0c1256a2a0027a1e/2cf803a303bfc61ac1256b6700650a53?OpenDocument> 12

Office of the United Nations High Commissioner for Human Rights, *Status of Ratification of the Principal International Human Rights Treaties*, as of June 3, 2004, *at* <http://www.unhchr.ch/pdf/report.pdf> 14

Office of the United Nations High Commissioner for Human Rights, *Status of Ratification of the Convention on the Rights of the Child*, Nov.14, 2003, *at*

<http://www.unhchr.ch/html/menu2/6/crc/treaties/status-crc.htm> 12

Organization of American States, Secretariat for Legal Affairs, B-32: American Convention on Human Rights, "Pact of San Jose, Costa Rica", June 21, 2004, *at* <http://www.oas.org/juridico/english/Sigs/b-32.html> 18

President's Message to the Senate Transmitting Four Treaties Pertaining to Human Rights, in U.S. Ratification of the Human Rights Treaties: With or Without Reservations? 85 (Richard B. Lillich ed. 1981) 19

Report of the Secretary General, U.N. ESCOR, Economic and Social Council, Crime Prevention and Criminal Justice: Capital Punishment and Implementation of the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty. Subst. Sess., U.N. Doc. E/2000/3 (2000) 13

Resolution on Minimum Rules for the Administration of Juvenile Justice, G.A. Res 40/33, Annex, 40 U.N. GAOR Supp. (No. 53), U.N. Doc. A/40/53 (1985) 22

Restatement (Third) of the Foreign Relations Law (1986) 20

Richard J. Wilson, *The United States' Position on the Death Penalty in the Inter-American Human Rights System*, 42 Santa Clara L. Rev. 1159 (2002) 19

Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, ESC. Res. 1984/50, U.N. ESCOR, Annex, Supp. (No. 1), U.N. Doc. E/1984/84 (1984), endorsed by the U.N. General Assembly in Resolution 39/118 22

Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Milan 1985. United Nations Standard Minimum Rules for the Administration of Juvenile Justice, adopted by General Assembly Resolution 40/33 of 29 November, 1985 ("The Beijing Rules") 22

U.N. Commission on Human Rights, *Human Rights in the Administration of Justice, in Particular Juvenile Justice*, 58th Sess. Resolution 2002/47, U.N. Doc. E/CN.4/RES/2002/47 (2002) 23

U.N. Commission on Human Rights, *Human Rights in the Administration of Justice, in Particular Juvenile Justice*, 60th Sess. Resolution 2004/43, U.N. Doc. E/CN.4/RES/2004/43 (2004) 23

U.N. Commission on Human Rights, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, U.N. Doc. E/CN.4/1991/36 (1991) 24

U.N. Commission on Human Rights, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, U.N. Doc. E/CN.4/1992/30 (1992) 24

U.N. Commission on Human Rights, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, U.N. Doc. E/CN.4/1993/46 (1992).....24

U.N. Commission on Human Rights, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, U.N. Doc. E/CN.4/1994/7 (1993).....24

U.N. Commission on Human Rights, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, U.N. Doc. E/CN.4/1995/61 (1994).....24

U.N. Commission on Human Rights, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, U.N. Doc. E/CN.4/1997/60 (1996).....24

U.N. Commission on Human Rights, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, U.N. Doc. E/CN.4/1998/68 (1997).....24

U.N. Commission on Human Rights, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, U.N. Doc. E/CN.4/1999/39 (1999).....24

U.N. Commission on Human Rights, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, U.N. Doc. E/CN.4/2000/3 (2000).....24

U.N. Commission on Human Rights, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, U.N. Doc. E/CN.4/2001/9 (2001).....24

U.N. Commission on Human Rights, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, U.N. Doc. E/CN.4/2002/74 (2002).....24

U.N. Commission on Human Rights, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, U.N. Doc. E/CN.4/2004/7 (2004).....24

U.N. Commission on Human Rights, *Report by the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions on a Mission to the United States of America*, U.N. Doc. E/CN.4/1998/68/Add.3 (1998).....25

U.N. Commission on Human Rights, *Rights of the Child*, 57th Sess., Resolution 2001/75, U.N. Doc. E/CN.4/RES/2001/75 (2001).....23

U.N. Commission on Human Rights, *Rights of the Child*, 58th Sess., Resolution 2002/92, U.N. Doc. E/CN.4/RES/2002/92 (2002).....23

U.N. Commission on Human Rights, *Rights of the Child*, 59th Sess., Resolution 2003/86, U.N. Doc. E/CN.4/RES/2003/86 (2003).....23

U.N. Commission on Human Rights, *Rights of the Child*, 60th Sess., Resolution 2004/48, U.N. Doc. E/CN.4/RES/2004/48 (2004).....23

U.N. Commission on Human Rights, Summary Record of the 53rd meeting, 56th Sess., Apr. 17, 2000, U.N. Doc. E/CN.4/2000/SR 53 (2000) 10

U.N. Commission on Human Rights, *The Question of the Death Penalty*, 53d Sess., U.N. Doc. E/CN.4/RES1997/12 (Apr. 3, 1997) 22

U.N. Commission on Human Rights, *The Question of the Death Penalty*, 54th Sess., U.N. Doc. E/CN.4/RES/1998/8 (Apr. 3, 1998) 22

U.N. Commission on Human Rights, *The Question of the Death Penalty*, 55th Sess., UN Doc. E/CN.4/RES/1999/61 (Apr. 28, 1999) 22

U.N. Commission on Human Rights, *The Question of the Death Penalty*, 56th Sess., U.N. Doc. E/CN.4/RES/2000/65 (Apr. 26, 2000) 22

U.N. Commission on Human Rights, *The Question of the Death Penalty*, 57th Sess., U.N. Doc. E/CN.4/RES/2001/68 (Apr. 25, 2001) 23

U.N. Commission on Human Rights, *The Question of the Death Penalty*, 58th Sess., U.N. Doc. E/CN.4/RES/2002/77 (Apr. 25, 2002) 23

U.N. Commission on Human Rights, *The Question of the Death Penalty*, 59th Sess., U.N. Doc. E/CN.4/RES/2003/67 (Apr. 24, 2003) 23

U.N. Commission on Human Rights, *The Question of the Death Penalty*, 60th Sess., U.N. Doc. E/CN.4/RES/2004/67 (Apr. 21, 2004) 23

United Nations General Assembly, *Note by the Secretary General, Annexed with a Report of the Special Rapporteur of the Commission on Human Rights on Extrajudicial, Summary or Arbitrary Executions*, U.N. Doc. A/51/457 (1996) 24

United Nations General Assembly, *Report of the Ad Hoc Committee of the Whole of the twenty-seventh special session of the General Assembly*, Supplement No. 3, A/S-27/19/Rev.1 (May 2002) 14

U.N. Sub-Commission on Human Rights, Summary Record of the 6th Meeting, 52d Sess., Aug. 4, 2000, E/CN.4/SUB.2/2000/SR.6 (2000) 10

U.N. Sub-Commission on the Promotion and Protection of Human Rights, *The Death Penalty, Particularly in Relation to Juvenile Offenders*, 52d Sess., Res. 1999/4, U.N. Doc. E/CN.4/SUB.2/RES/1999/4 (1999) 25

U.N. Sub-Commission on the Promotion and Protection of Human Rights, *The Death Penalty, Particularly in Relation to Juvenile Offenders*, 53d Sess., Res. 2000/17, U.N. Doc. E/CN.4/SUB.2/RES/2000/17 (2000) 25

World Organization Against Torture, Case COD 270401.1.CC (May 2001) 10

INTEREST OF AMICI CURIAE[1]

The European Union ("EU") considers the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, to be of vital importance both nationally and in the international community. These principles are common to its 25 Member States: Austria, Belgium, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Slovakia, Slovenia, Spain, Sweden, and the United Kingdom. The EU and its Member States, as members of the international community, have a strong interest in providing information to this Court on international human rights norms in a case in which those norms may be relevant.

The EU and its Member States share the widespread opinion of the international community of States that the execution of persons below 18 years of age at the time of their offenses violates widely accepted human rights norms and the minimum standards of human rights set forth by the United Nations. Furthermore, the EU and its Member States are opposed to the death penalty in all cases and accordingly aim at its universal abolition. The abolition of the death penalty

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[1] In accordance with Supreme Court Rule 37.6, amici curiae represent that no party other than amici and counsel for amici authored this brief in whole or in part, and no person or entity, other than amici and counsel, have made a monetary contribution to the preparation or submission of this brief. Both parties have consented to the filing of this brief. Their letters of consent are being filed with the Clerk of the Court, jointly with this brief, pursuant to Supreme Court Rule 37.3 (a). Counsel of record acknowledges the invaluable coordination and research for this project from Anne James, Executive Director, International Justice Project and her staff. William J. Mertens acted as counsel for the EU on an earlier version of this brief.

contributes to the enhancement of human dignity and the progressive development of human rights. This view has been expressed to the Government of the United States through various general demarches and through specific demarches in cases involving, *inter alia*, the pending execution of persons under the age of 18 at the time of their offenses.[2]

The EU and its Member States pursue this policy consistently in different international fora such as the United Nations and the Council of Europe, as well as through bilateral contacts with many countries that retain the death penalty.[3] The EU provides a special and unique perspective to this Court that is not available through the views of the parties or other *amici*.

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[2] Demarches in the cases of persons under the age of 18 at the time of their offenses were transmitted in each of the following: Sean Sellars, Oklahoma, February 11, 1999; Douglas Thomas, Virginia, June 20, 1999; Steve Roach, Virginia, January 14, 2000; Gary Graham, Texas, May 17, 2000 & June 22, 2000; Glen McGinnis, Texas, January 18, 2000; Gerald Mitchell, Texas, October 3, 2001; Napoleon Beazley, Texas, July 20, 2001, August 10, 2001, August 14, 2001 & May 7, 2002; Antonio Richardson, Missouri, February 21, 2001; Alexander Williams, Georgia, February 14, 2002; Christopher Simmons, Missouri, April 17, 2002; T.J. Jones, Texas, July 23, 2002; Toronto Patterson, Texas, July 29, 2002; Kevin Stanford, Kentucky, October 7, 2002; Ronald Chris Foster, Mississippi, December 16, 2002; Scott Hain, Oklahoma, February 26, 2003. All these communications can be found on the Internet, EU Policy and Action on the Death Penalty, *at* <http://www.eurunion.org/legislat/DeathPenalty/deathpenhome.htm#ActiononUSDeathRowCases>.

[3] *See* European Union, *Guidelines to EU Policy Towards Third Countries on the Death Penalty* (3 June 1998), *at* <www.eurunion.org/legislat/deathPenalty/Guidelines.htm>.

Canada, the Council of Europe,[4] Iceland, Liechtenstein, Mexico,[5] New Zealand, Norway, and Switzerland have explicitly expressed to the European Union and its Member States their shared interest as *amici* and their support for the arguments put forward in the present brief.

The positions taken in the following arguments, while expressed as those of the European Union, are shared by all signatories to the brief.

CONSTITUTIONAL PROVISIONS AND TREATIES INVOLVED

U.S. Constitution, Amendment 8:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

International Covenant on Civil and Political Rights, Art. 6(5):

> Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out against pregnant women.

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[4] The Council of Europe is composed of 45 Member States: Albania, Andorra, Armenia, Austria, Azerbaijan, Belgium, Bosnia & Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, Netherlands, Norway, Poland, Portugal, Romania, Russian Federation, San Marino, Serbia and Montenegro, Slovakia, Slovenia, Spain, Sweden, Switzerland, The Former Yugoslav Republic of Macedonia, Turkey, Ukraine, and the United Kingdom. *See* Appendix A for The Council of Europe's Statement of Interest.

[5] *See* Appendix B for Mexico's Statement of Interest.

American Convention on Human Rights, Art. 4(5):

> Capital punishment shall not be imposed upon persons who, at the time the crime was committed, were under 18 years of age . . . .

United Nations Convention on the Rights of the Child, Art. 37(a):

> Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age . . . .

Fourth Geneva Convention, Art. 68.4:

> [T]he death penalty may not be pronounced against a protected person who was under eighteen years of age at the time of the offence.

Vienna Convention on the Law of Treaties, Part II, Sect. 1, Art. 18, and Sect. 2, Art. 19:

> SECTION 1. CONCLUSION OF TREATIES.
>
> Article 18
>
> Obligation not to defeat the object and purpose of a treaty prior to its entry into force
>
> A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when:
>
> a. It has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have

> made its intention clear not to become a party to the treaty; or
>
> b. It has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.
>
> SECTION 2. RESERVATIONS.
>
> Article 19
>
> Formulation of reservations
>
> A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless:
>
> a. The reservation is prohibited by the treaty;
>
> b. The treaty provides that only specified reservations, which do not include the reservation in question, may be made; or
>
> c. In cases not falling under sub-paragraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.

STATEMENT OF THE CASE

The EU has no independent knowledge of the circumstances of this case, but from prior court filings, understands that Christopher Simmons is on death row in the state of Missouri after being found guilty of committing murder when he was only 17 years old. The EU also understands that Christopher Simmons' age at the time of the murder is uncontested, and considers that his execution would violate widely accepted international human rights norms.

SUMMARY OF ARGUMENT

There is wide agreement within the international community against the execution of juveniles under the age of 18 at the time of their offenses. This consensus is evidenced by the practices of the overwhelming majority of nations; provisions of international law including treaties to which the United States is a party; and the positions of States before international bodies. The EU respectfully submits this brief so that the Court may take the existence of this consensus into account in its consideration of this case.

ARGUMENT

THERE IS AN INTERNATIONAL CONSENSUS AGAINST THE EXECUTION OF PERSONS BELOW THE AGE OF 18 AT THE TIME OF THE OFFENSE

The EU submits this brief in support of the virtually unanimous international consensus against the execution of persons who were under 18 years of age at the time of their offense.

In assessing whether a particular punishment violates the prohibition against cruel and unusual punishment in the

Eighth Amendment to the United States Constitution, this Court has said that it is guided by the "evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion). As evidence of those standards, the Court has consulted a number of sources beginning with the current opinions and attitudes of the American people, as well as the actions of State legislatures. Ultimately, it considers the proportionality of the punishment to the offense. At least when, as a threshold matter, American society seems generally set against a certain punishment, the Court has examined "the views of the international community in determining whether a punishment is cruel and unusual." *Thompson v. Oklahoma*, 487 U.S. 815, 830 n.31 (1988) (plurality opinion striking down the death penalty for children under 16) (citing *Trop v. Dulles*, 356 U.S. at 102 & n.35; *Coker v. Georgia*, 433 U.S. 584, 596 n.10 (1977); *Enmund v. Florida*, 458 U.S. 782, 796-797 n.22 (1982)).

In *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 2249, n. 21 (2002), six Justices of this Court concluded that the overwhelming disapproval of the world community is a relevant factor in determining the "social and professional consensus" against the imposition of capital punishment on mentally retarded persons. That consensus made the practice of the death penalty against such persons "truly unusual," in violation of the Eighth Amendment to the United States Constitution. *Id.* at 2249. The EU considers the argument against the execution of juvenile offenders to be analogous. The practice of other nations in not imposing capital punishment upon persons under the age of 18 at the time of the offense demonstrates a similarly overwhelming disapproval by the international community which, in this case, should be considered by the Court in discerning social and professional consensus. Even more recently, in *Lawrence v. Texas*, 123 S.Ct. 2472, 2483 (2003), this Court

looked to the jurisprudence of the European Court of Human Rights and other countries where the issue involved reliance on values shared by the United States "with a wider civilization."

In the 15 years since this Court's approval of the death penalty for 16 and 17 year old juvenile offenders in *Stanford v. Kentucky*, 492 U.S. 361 (1989), the direction of U.S. practice has consistently moved away from the application of the death penalty to juveniles.[6] This trend is consistent with international practice and in harmony with a near-unanimous international norm against such executions. Among the 38 U.S. States authorizing the death penalty, 18 have expressly set a minimum age of 18 at the time of the crime as the eligibility threshold for the death penalty. In addition, the U.S. Federal Government and the U.S. Military both prohibit the execution of those under 18 years of age. Again, this trend is consistent with international practice and in harmony with the above-mentioned wide agreement within the international community against such executions. Accordingly, the EU respectfully suggests that this consensus further justifies re-examination of the application of the Cruel and Unusual Punishment Clause to the execution of a now-limited category of juvenile offenders.

A. Execution of Persons Under the Age of 18 at the Time of the Offense is Contrary to the Practice of Virtually All Nations.

Since 1990, only eight countries reportedly executed children: Iran (8), Saudi Arabia (1), Nigeria (1), the

[6] Amnesty International, *United States of America: Indecent and Internationally Illegal: The Death Penalty Against Child Offenders*, AI Index: AMR 51/143/2002, Sept. 2002, at 15-25.

Democratic Republic of Congo ("DRC") (1), Yemen (1), Pakistan (3), China (1) and the United States (19).[7]

Between the years 2001 and 2004, four nations reportedly executed juvenile offenders. Indeed, the last 14 years have seen a marked reduction in the number of nations that allow such executions. In the year 2002, only the U.S. reportedly carried out executions of juvenile offenders: Toronto Patterson, T. J. Jones and Napoleon Beazley. Each of these executions took place in Texas. In 2003, China and the U.S. were the only countries to have reportedly executed juveniles: in January 2003, Zhao Lin was executed in China and, in April 2003, Scott Hain (Oklahoma) was executed in the U.S.[8]

In 1994, Yemen removed itself from the dwindling group of nations still permitting the execution of juvenile offenders by enacting a new Penal Code that increased the minimum age for the application of the death penalty to 18 years.[9] Since enactment, there have been no reported executions of juveniles in Yemen. In 2000, the Nigerian Government

[7] Amnesty International, *Children and the Death Penalty, Executions Worldwide Since 1990*, AI Index: ACT 50/007/2002, 25 Sept. 2002, *at* 14; updated to June 6, 2004 by International Justice Project, *US Juvenile Executions Since 1976*, Mar. 2004, *at* <http://www.internationaljusticeproject.org/juvStats.cfm>; International Justice Project, *Reported Worldwide Executions of Juveniles Since 1990*, Mar. 2004, *at* <http://www.internationaljusticeproject.org/juvWorld.cfm>.

[8] International Justice Project, *US Juvenile Executions Since 1976*, Mar. 2004, *at* <http://www.internationaljusticeproject.org/juvStats.cfm>; International Justice Project, *Reported Worldwide Executions of Juveniles Since 1990*, Mar. 2004, *at* <http://www.internationaljusticeproject.org/juvWorld.cfm>.

[9] Amnesty International, *Yemen Ratification Without Implementation: the State of Human Rights in Yemen*, AI Index: MDE 31/01/97, at 34, 37 (Mar. 1997).

asserted to the United Nations Sub-Commission on Human Rights that earlier reports were incorrect and that the execution that took place in 1997 was not of a juvenile offender. It further reiterated that any juveniles convicted of capital offenses have had their sentences commuted.[10] In addition, Saudi Arabia has emphatically denied the alleged 1992 execution of a juvenile offender.[11]

Notwithstanding a declaration in December 1999 by the Minister for Human Rights that the Government of the DRC was exercising a moratorium on executions, a 14-year-old child soldier was executed on January 15, 2000, within 30 minutes of his trial by a Military Order Court.[12] However, according to the World Organization Against Torture, four juvenile offenders who subsequently were sentenced to death in the DRC military courts were granted stays. The sentences of all four were then commuted following appeals from the international community.[13]

In July 2000, Pakistan outlawed juvenile executions when it adopted the Juvenile Justice System Ordinance, signed on July 1, 2000. Nevertheless, it has been reported that Pakistan executed Ali Sher on November 3, 2001 for a crime he committed at the age of 13. President Perwez Musharrah of Pakistan subsequently commuted the death sentences of

[10] U.N. Sub-Commission on Human Rights, Summary Record of the 6th Meeting, 52nd Sess., Aug. 4, 2000, E/CN.4/Sub.2/2000/SR.6 para. 39 (2000).
[11] U.N. Commission on Human Rights, Summary Record of the 53rd meeting, 56th Sess., Apr. 17, 2000, E/CN.4/2000/SR.53, paras. 88 and 92 (2000).
[12] Amnesty International, *Democratic Republic of Congo: Killing Human Decency*, AI Index: AFR 62/07/00, May 31, 2000, at 12.
[13] World Organization Against Torture, Case COD 270401.1.CC, 31 (May 2001).

approximately 100 child offenders imposed before the death penalty for child offenders was abolished in July 2000.[14]

In common with Pakistan, the domestic law in China prohibits the execution of juveniles.[15] However, in January 2003, Zhao Lin, aged 18, was executed for an offense committed when he was 16 years old. It has been suggested that Chinese courts may not take sufficient care to determine the age of juvenile offenders,[16] which could have resulted in this aberration of domestic law.

Most recently, it has been reported that Iran executed Mohammad Mohammadzadeh on January 25, 2004 for an offense committed at the age of 17.[17] Significantly however, in December 2003, a bill to raise the minimum age for imposition of the death penalty to 18 was approved by the Iranian parliament. The bill is currently awaiting approval by the highest legislative body, the Guardian Council, in order to become law.[18]

Thus, the United States, at present, stands virtually alone among all the nations of the world in actively carrying out death sentences for offenses committed by children.

[14] Amnesty International, *Pakistan: Young offenders taken off death row*, AI Index: ASA 33/029/2001, Dec. 13, 2001.
[15] Amnesty International, *Which Countries Still Use the Death Penalty against Child Offenders?*, visited on June 21, 2004, *at* <http://www.amnestyusa.org/abolish/juveniles/countries.html>.
[16] *Id.*
[17] Amnesty International, *Execution of Child Offenders: Updated Summary of Cases*, Feb. 16, 2004, *at* <http://news.amnesty.org/mav/index/ENGPOL300062004>.
[18] *Id.*

B. International Instruments Prohibit the Execution of Juvenile Offenders.

In the view of the EU, a significant number of treaties, including a number ratified or signed by the United States, prohibit the execution of persons under the age of 18 at the time of their offenses. The bodies charged with interpretation of those treaties also support this view.

The United Nations Convention on the Rights of the Child ("CRC") is the most widely ratified human rights treaty in the world. All Member States of the United Nations barring two, some 192 nations, have ratified the CRC.[19] No other human rights instrument has achieved this level of global recognition. The U.S. and Somalia are the only two nations that have not ratified the CRC. The U.S. signed the CRC in February of 1995,[20] and Somalia signed the CRC in May of 2002, indicating its intent to ratify.[21] As stated in Article 18 of the Vienna Convention on the Law of Treaties ("Vienna Convention"), a nation is obliged to "refrain from acts which would defeat the object and purpose of the treaty after

[19] Office of the United Nations High Commissioner for Human Rights, *Status of Ratification of the Convention on the Rights of the Child*, as of November 14, 2003, *at* <http://www.unhchr.ch/html/menu2/6/crc/treaties/status-crc.htm>.

[20] Office of the United Nations High Commissioner for Human Rights, *Convention on the Rights of the Child: United States of America*, visited on June 21, 2004, *at* <http://www.unhchr.ch/tbs/doc.nsf/887ff7374eb89574c1256a2a0027ba1f/815f8bc03a4089f3c1256b67006555ea?OpenDocument>.

[21] Office of the United Nations High Commissioner for Human Rights, *Convention on the Rights of the Child: Somalia*, visited on June 21, 2004, *at* <http://www.unhchr.ch/tbs/doc.nsf/22b020dc61f10ba0c1256a2a0027a1c/2cf803a303bfc61ac1256b6700650a53?OpenDocument>.

signature and prior to ratification."[22] Although the United States is not a party to the Vienna Convention, the U. S. Department of State has recognised it as the authoritative guide to current treaty law and procedure.[23] This provision would therefore be taken into account when examining whether the actions of a State, which had signed but not ratified the CRC, were contrary to the object and purpose of the Treaty.

Article 37(a) of the CRC prohibits the execution of juvenile offenders. It provides that "[n]either capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age . . . ." A Report of the Secretary General, U.N. ESCOR, Economic and Social Council, Subst. Sess., U.N. Doc. E/2000/3 at 21 ¶ 90 (2000), notes that in all but 14 States parties to the CRC, national laws prohibit the imposition of the death penalty on persons who committed the offense when under 18 years of age.

In May of 2002, the United Nations General Assembly unanimously adopted an extensive resolution, "A World Fit For Children", in which the body declared that "we acknowledge that the Convention on the Rights of the Child, the most universally embraced human rights treaty in history . . . contain[s] a comprehensive set of international legal standards for the protection and well-being of children." The document further calls upon the Governments of all States, "in particular States in which the death penalty had not been abolished, to comply with the obligations they have assumed under relevant provisions of international human rights

[22] The Vienna Convention on the Law of Treaties, U.N. Doc. A/Conf.39/27 at 289 (1969), 1155 U.N.T.S. 331, reprinted in 8 I.L.M. 679 (1969).

[23] The Vienna Convention on the Law of Treaties, S. Exec. Doc. No. 92-1, 92nd Cong., 1st Sess. 1 (1974).

instruments, including in particular Articles 37 and 40 of the Convention on the Rights of the Child and Articles 6 and 14 of the International Covenant on Civil and Political Rights".[24]

Some 152 nations have ratified the International Covenant on Civil and Political Rights ("ICCPR").[25] Article 6(5) of the ICCPR specifically forbids the use of the death penalty against those under 18 at the time of the crime: "Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age . . . ." The United States signed the ICCPR in 1979 and ratified it in 1992 with a reservation to Article 6(5), stating that "the United States reserves the right, subject to its Constitutional constraints, to impose capital punishment on any person (other than a pregnant woman) duly convicted under existing or future laws permitting the imposition of capital punishment, including such punishment for crimes committed by persons below eighteen years of age," and a more general declaration that the provisions of Articles 1 through 27 of the Covenant were not self-executing. As articulated in Article 19 of the Vienna Convention, a State may, when ratifying a treaty, formulate a reservation, but the reservation must not be "incompatible with the object and purpose of the treaty."

Article 4(2) of the ICCPR states that no derogation can be made from Article 6 even in times of public emergency, thus indicating that Article 6 is seen to be inherent to the object

[24] United Nations, *Report of the Ad Hoc Committee of the Whole of the twenty-seventh special session of the General Assembly*, Supplement No. 3, A/S-27/19/Rev.1 (May 2002), at ¶¶ 4, 44.8.

[25] Office of the United Nations High Commissioner for Human Rights, *Status of Ratification of the Principal International Human Rights Treaties*, as of June 3, 2004, at 12, *at* <http://www.unhchr.ch/pdf/report.pdf>.

and purpose of the ICCPR. The EU notes that the United States has made no reservation to Article 4(2).

The Human Rights Committee ("HRC") is the treaty body that monitors and reports on matters relating to the ICCPR. By ratifying the ICCPR, the United States has expressly recognized the authority of the HRC.[26] A number of federal courts also have explicitly recognized the HRC's authority in matters of the ICCPR's interpretation. *See, e.g., United States v. Duarte-Acero*, 208 F.3d 1282, 1287 (11th Cir. 2000) (the HRC's guidance may be the "most important" component in interpreting ICCPR claims); *United States v. Benitez*, 28 F. Supp. 2d 1361, 1364 (S.D. Fla. 1998) (same); *United States v. Bakeas*, 987 F. Supp. 44, 46, n.4 (D. Mass. 1997) (HRC has "ultimate authority to decide whether parties' clarifications or reservations have any effect"); *Maria v. McElroy*, 68 F. Supp. 2d 206, 232 (E.D.N.Y 1999) (HRC interpretations as "authoritative").

In General Comment No. 24 (52), U.N. Doc. CCPR/C/21/Rev.1/Add.6 (1994), the HRC states, in relevant part:

> 6. . . . [W]here a reservation is not prohibited by the treaty or falls within the specified permitted categories, a State may make a reservation provided it is not incompatible with the object and purpose of the treaty.
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> ***

[26] That recognition extends to State reporting requirements under Article 40 of the Covenant, but the U.S. has also filed a declaration recognizing the competence of the Human Rights Committee under Article 41 to hear complaints between State parties. Multilateral Treaties Deposited With the Secretary General, Status as of Dec. 31 1994, U.N. Doc. ST/LEG/SER.E/13 at 133 (1995).

8. Reservations that offend peremptory norms would not be compatible with the object and purpose of the Covenant. Although treaties that are mere exchanges of obligations between States allow them to reserve *inter se* application of rules of general international law, it is otherwise in human rights treaties, which are for the benefit of persons within their jurisdiction. Accordingly, provisions in the Covenant that represent customary international law (and *a fortiori* when they have the character of peremptory norms) may not be the subject of reservations. Accordingly, a State may not reserve the right (...) to execute children (...).

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10. . . . While there is no automatic correlation between reservations to non-derogable provisions, and reservations which offend against the object and purpose of the Covenant, a State has a heavy onus to justify such a reservation.

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18. . . . The normal consequence of an unacceptable reservation is not that the Covenant will not be in effect at all for a reserving party. Rather, such a reservation will generally be severable, in the sense that the Covenant will be operative for the

reserving party without benefit of the reservation.[27]

In 1995, the HRC applied General Comment No. 24 to the first U.S. report on domestic compliance with the ICCPR and found that the U.S. reservation to Article 6(5) was incompatible with the object and purpose of the treaty. It recommended that the U.S. withdraw the reservation.[28]

With regard to the regional human rights systems, it is to be noted that the abolition of the death penalty became a pre-condition for membership of the Council of Europe. To date, 41 of the 45 Member States of the Council of Europe have abolished the death penalty, while the remaining four Member States are observing a *de facto* or *de jure* moratorium.

Forty-five Member States have signed the European Convention for the Protection of Human Rights and

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[27] The full text of General Comment No. 24 is attached to this brief as Appendix C.

[28] *See* Consideration of Reports Submitted by State Parties Under Article 40 of the Covenant, U.N. Hum. Rts. Comm., 53d Sess., 1413th mtg., at 14, U.N. Doc. ICCPR/C/79/Add.50 (1995). In reaction to the U.S. report on compliance, the Human Rights Committee said:

> Para. 279. The Committee is . . . particularly concerned at reservations to Article 6, paragraph 5, and Article 7 of the Covenant, which it believes to be incompatible with the object and purpose of the Covenant.
>
> . . .
>
> Para. 281. [The HRC] deplores provisions in the legislation of a number of states which allow the death penalty to be pronounced for crimes committed by persons under 18. . . .

Fundamental Freedoms.[29] As of June 5, 2004, 44 Member States of the Council of Europe have signed the 6th Protocol to the above instrument concerning the Abolition of the Death Penalty.[30] In the same vein, 42 Member States of the Council of Europe have signed the recently adopted (May 2002) Protocol No. 13 to the same Convention, concerning the abolition of the death penalty under all circumstances.[31]

Article 12 of the Arab Charter on Human Rights, adopted in 1997 by the League of Arab States, also prohibits the death penalty for persons under the age of 18.[32] By the end of 2001, 26 countries had ratified the African Charter on the Rights and Welfare of the Child, [33] and, as of May 2004, 24 countries had ratified the American Convention on Human Rights,[34] both of which prohibit the death penalty for crimes committed by children.

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[29] Council of Europe, *Convention for the Protection of Human Rights and Fundamental Freedoms*, CETS No.: 005, as of June 21, 2004, *at* <http://conventions.coe.int/treaty/Commun/ChercheSig.asp?NT=005&CM=&DF=&CL=ENG>.

[30] Council of Europe, *Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the Abolition of the Death Penalty*, CETS No.: 114, as of June 21, 2004, *at* <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=114&CM=&DF=&CL=ENG>.

[31] Council of Europe, *Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the abolition of the death penalty in all circumstances*, CETS No.: 187, as of June 21, 2004, *at* <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=187&CM=1&DF=&CL=ENG>.

[32] *Arab Charter on Human Rights, reprinted* in 18 Hum. Rts. L.J. 151 (1997).

[33] Amnesty International, *supra* note 6, at 84.

[34] Organization of American States, Secretariat for Legal Affairs, B-32: American Convention on Human Rights, "Pact of San Jose, Costa Rica," visited on June 21, 2004, *at* <http://www.oas.org/juridico/english/Sigs/b-32.html>.

The American Convention on Human Rights, the principal human rights treaty of the Organization of American States ("OAS"), of which the U.S. is a member, provides: "Capital punishment shall not be imposed upon persons who, at the time the crime was committed, were under 18 years of age. . . ."[35] The U.S. signed the agreement in 1977 with a proposed reservation limiting U.S. adherence to "the Constitution and other law of the United States."[36] However, a further human rights instrument in the Americas, the American Declaration on the Rights and Duties of Man ("American Declaration") has been interpreted on several occasions to create binding legal obligations on all OAS Member States, including the United States.[37] Applying those obligations to the U.S., the Inter-American Commission on Human Rights recently found the U.S. practice of sentencing to death juvenile offenders, under the age of 18 at the time of their offense, in violation of a peremptory, or *jus cogens* norm of international law. *Domingues v. United States*, Report No. 62/02, Case 12.285, OEA/Ser.L/V/II.116, Doc. 33, October 22, 2002. The

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[35] American Convention on Human Rights, Ch. II, art. 4, § 5, OASTS No. 36; OAS OFF Rec. OEA/SER L/V/II.23 Doc. 21 Rev. 6 (1979).

[36] *President's Message to the Senate Transmitting Four Treaties Pertaining to Human Rights*, in U.S. Ratification of the Human Rights Treaties: With or Without Reservations? 85, 105 (Richard B. Lillich ed. 1981).

[37] Advisory Opinion No. OC-10/90, *Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights*, Inter-Am. Ct. H.R., Ser. A, No. 10 (1989), at ¶¶ 35-45; *Roach and Pinkerton v. United States*, Inter-Am. C.H.R. 147, OEA/ser.L/V/II.71, doc. 9, rev. 1 (1987), at ¶¶ 46-49; *Garza v. United States*, Inter-Am. C.H.R. 1255, OEA/ser.L/V/II.111, doc. 20 rev. (2001), at ¶ 60; *Edwards et al. v. The Bahamas*, Report No. 48/01, Cases 12.067, 12.068, 12.086 (April 4, 2001), at ¶¶ 124-154. *See generally* Richard J. Wilson, *The United States' Position on the Death Penalty in the Inter-American Human Rights System*, 42 Santa Clara L. Rev. 1159 (2002).

decision in *Domingues* provides an exhaustive review of the relevant international law and standards, as well as the law and practice of nations. *Id.* at ¶¶ 40-83.

As detailed in Article 53 of the Vienna Convention on the Law of Treaties, a *jus cogens* norm is a "norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."[38] The Restatement (Third) of the Foreign Relations Law (1986), agrees with this standard, stating that a *jus cogens* norm is established where there is acceptance and recognition by a "large majority" of States, even if over dissent by "a very small number of states."[39]

As stated in the decision of the Inter-American Commission on Human Rights in *Domingues*, *supra*, at ¶ 85, "As a *jus cogens* norm, this proscription binds the community of States, including the United States. The norm cannot be validly derogated from, whether by treaty *or by the objection of a state, persistent or otherwise*" (emphasis added).

Furthermore, in *Domingues*, *supra*, at ¶ 106, it was explicitly found that the U.S. Government could not legitimately invoke the persistent objector principle to exempt itself from the norm against the execution of juveniles.

The Inter-American Commission on Human Rights has subsequently reaffirmed its ruling in three United States

[38] *Supra*, n.22, at Art.53.

[39] Restatement (Third) of the Foreign Relations Law § 102, and Reporter's Note 6 (1986) (citing Report of the Proceedings of the Committee of the Whole, May 21, 1968, U.N. Doc. A/CONF.39/11 at 471-77).

cases involving juvenile offenders: Napoleon Beazley,[40] Gary Graham[41] and Douglas Thomas.[42]

Finally, Article 68, paragraph 4, of the Fourth Geneva Convention states that "the death penalty may not be pronounced against a protected person who was under eighteen years of age at the time of the offence."[43] By ratifying this treaty in 1955, without reservation to that paragraph, the United States agreed that in the event of war or other armed conflict in which it may become involved, the United States will protect all civilian children in occupied countries from the death penalty.

C. International Norms and Standards Overwhelmingly Reject the Propriety of the Death Penalty for Juvenile Offenders.

International norms and standards adopted by international bodies and organisations, including the United Nations, further reflect the international consensus against the death penalty for juvenile offenders.

Resolutions by the United Nations Economic and Social Council ("ECOSOC") and the United Nations General Assembly have opposed imposition of the juvenile death

[40] *Napoleon Beazley v. United States*, Report No. 101/03, Merits Case 12.412, Dec. 29, 2003, *at* <http://www.cidh.org/annualrep/2003eng/USA.12412.htm>.

[41] *Gary Graham v. United States*, Report No. 97/03, Case No. 11.193, Dec. 29, 2003, *at* <http://www.cidh.org/annualrep/2003eng/USA.11193.htm>.

[42] *Douglas Christopher Thomas v. United States*, Report No. 100/03, Case No. 12.240, Dec. 29, 2003, *at* <http://www.cidh.org/annualrep/2003eng/USA.12240.htm>.

[43] *Convention Relative to the Protection of Civilian Persons in Time of War*, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287 (1949).

penalty for some time. ECOSOC adopted *Safeguards Guaranteeing Protection of the Rights of those Facing the Death Penalty*, ECOSOC Res. 1984/50, U.N. Doc. E/1984/84 (1984), which explicitly prohibit the execution of juveniles in Article 3.

The Seventh United Nations Congress on the Prevention of Crime and Treatment of Offenders opposed the execution of juvenile offenders in its Standard Minimum Rules for the Administration of Juvenile Justice, also known as "The Beijing Rules".[44] In 1985, the United Nations General Assembly adopted The Beijing Rules by consensus.[45]

The United Nations Commission on Human Rights, at its 53rd Session in 1997, passed a resolution calling on States to consider abolishing the death penalty altogether and urging those States retaining such a punishment not to impose it for crimes committed by persons under the age of 18 at the time of the offense.[46] Every year thereafter, the Commission has passed a similar resolution.[47] In 2001, a Commission

[44] The Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Milan 1985, United Nations Standard Minimum Rules for the Administration of Juvenile Justice, adopted by General Assembly Resolution 40/33 of 29 November 1985 ("The Beijing Rules"). Article 17.2 of The Beijing Rules, which sets out the Guiding Principles in Adjudication and Disposition, states: "Capital punishment shall not be imposed for any crime committed by juveniles."

[45] G.A. RES 40/33, Annex, 40 U.N. GAOR Supp. (No 53) at 207, U.N. Doc. A/40/53 (1985).

[46] U.N. Commission on Human Rights, *The Question of the Death Penalty*, 53d Sess., U.N. Doc. E/CN.4/RES/1997/12 (Apr. 3 1997).

[47] U.N. Commission on Human Rights, *The Question of the Death Penalty*, 54th Sess. Resolution 1998/8, U.N. Doc. E/CN.4/RES/1998/8 (1998); U.N. Commission on Human Rights, *The Question of the Death Penalty*, 55th Sess. Resolution 1999/61, U.N. Doc. E/CN.4/RES/1999/61 (1999); U.N. Commission on Human Rights, *The Question of the Death Penalty*, 56th Sess. Resolution 2000/65, U.N. Doc. E/CN.4/RES/2000/65 (2000); U.N. Commission on Human Rights, *The Question of the Death*

resolution articulating the prohibition of the juvenile death penalty as a separate issue passed by consensus without vote. This resolution requests that Governments comply with the mandates of Article 37 of the CRC and Article 6(5) of the ICCPR. A similar resolution was adopted by consensus in 2002, by a vote on the relevant paragraph in 2003, and most recently reaffirmed in 2004.[48]

Since 1982, the United Nations Commission on Human Rights has appointed a Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, whose mandate has included review of those countries that still apply the death penalty. Over a decade ago, in 1991, the Special Rapporteur called on the United States to eliminate the death penalty for

Penalty, 57th Sess. Resolution 2001/68, U.N. Doc. E/CN.4/RES/2001/68 (2001); U.N. Commission on Human Rights, *The Question of the Death Penalty*, 58th Sess. Resolution 2002/77, U.N. Doc. E/CN.4/RES/2002/77 (2002); U.N. Commission on Human Rights, *The Question of the Death Penalty*, 59th Sess. Resolution 2003/67, U.N. Doc. E/CN.4/RES/2003/67 (2003); U.N. Commission on Human Rights, *The Question of the Death Penalty*, 60th Sess. Resolution 2004/67, U.N. Doc. E/CN.4/RES/2004/67 (2004). Voting on each of these resolutions included opposition and abstentions, and the U.S. voted against the resolution in each year in which it was a member of the Commission.

[48] *See* U.N. Commission on Human Rights, *Rights of the Child*, 57th Sess., Resolution 2001/75, U.N. Doc. E/CN.4/RES/2001/75, ¶ 28(a) (2001); U.N. Commission on Human Rights, *Rights of the Child*, 58th Sess., Resolution 2002/92, U.N. Doc. E/CN.4/RES/2002/92, ¶ 31 (2002); U.N. Commission on Human Rights, *Rights of the Child*, 59th Sess., Resolution 2003/86, U.N. Doc. E/CN.4/RES/2003/86, ¶ 35(a) (2003); U.N. Commission on Human Rights, *Rights of the Child*, 60th Sess., Resolution 2004/48, U.N. Doc. E/CN.4/RES/2004/48, ¶ 35 (a) (2004). The position adopted in the above resolutions is further supported by additional resolutions. *See* e.g. U.N. Commission on Human Rights, *Human Rights in the Administration of Justice, in Particular Juvenile Justice*, 58th Sess. Resolution 2002/47, U.N. Doc. E/CN.4/RES/2002/47, ¶ 19 (2002); U.N. Commission on Human Rights, *Human Rights in the Administration of Justice, in Particular Juvenile Justice*, 60th Sess. Resolution 2004/43, U.N. Doc. E/CN.4/RES/2004/43, ¶ 11 (2004).

juvenile offenders.[49] Each annual report from the Special Rapporteur since 1992 has raised issues concerning the execution of children in the United States and/or called for the elimination of capital punishment under those circumstances.[50] After a special mission to the United States,

[49] U.N. Commission on Human Rights, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, U.N. Doc. E/CN.4/1991/36 (1991), ¶¶ 514-515.

[50] U.N. Commission on Human Rights, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, U.N. Doc. E/CN.4/1992/30 (1992), ¶¶ 577-578; U.N. Commission on Human Rights, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, U.N. Doc. E/CN.4/1993/46 (1992), ¶¶ 50, 52, 625, 679; U.N. Commission on Human Rights, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, U.N. Doc. E/CN.4/1994/7 (1993), ¶¶ 620, 624, 630, 685, 687; U.N. Commission on Human Rights, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, U.N. Doc. E/CN.4/1995/61 (1994), ¶¶ 325, 327, 373, 380; U.N. General Assembly, *Note by the Secretary General, Annexed with a Report of the Special Rapporteur of the Commission on Human Rights on Extrajudicial, Summary or Arbitrary Executions*, U.N. Doc. A/51/457 (1996), ¶¶ 50, 85, 115, 143; U.N. Commission on Human Rights, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, U.N. Doc. E/CN.4/1997/60 (1996), ¶¶ 90, 116; U.N. Commission on Human Rights, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, U.N. Doc. E/CN.4/1998/68 (1997), ¶ 61, ¶¶ 91, 92 and Recommendation 1.1; U.N. Commission on Human Rights, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, U.N. Doc. E/CN.4/1999/39 (1999), ¶¶ 36, 82; U.N. Commission on Human Rights, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, U.N. Doc. E/CN.4/2000/3 (2000), ¶¶ 68, 73, 97; U.N. Commission on Human Rights, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, U.N. Doc. E/CN.4/2001/9 (2001), ¶¶ 65, 78, 119; U.N. Commission on Human Rights, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, U.N. Doc. E/CN.4/2002/74 (2002), ¶¶ 83, 102, 104, 149; U.N. Commission on Human Rights, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, U.N. Doc. E/CN.4/2004/7 (2004), ¶ 96.

the only one conducted in this country, the Special Rapporteur was particularly critical of U.S. practices in executing juvenile offenders, concluding that the practice was prohibited by international law and calling for its discontinuance. UN Commission on Human Rights, *Report by the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions on a Mission to the United States of America*, E/CN.4/1998/68/Add.3 (1998), at ¶¶ 49, 145 and 156(b).

Furthermore, the United Nations Sub-Commission on the Promotion and Protection of Human Rights has passed similar resolutions. In 1999, the United States was identified as one of six nations that had executed juvenile offenders since 1990. By the Sub-Commission's accounting, the United States was responsible for 10 of the 19 executions during that time period. The Sub-Commission condemned the imposition of the death penalty on those who were under 18 at the time of their offense and called on all States, including the United States, that still executed children to end that practice.[51] One year later, the Sub-Commission confirmed "that the imposition of the death penalty on those aged under 18 at the time of the commission of the offence is contrary to customary international law."[52]

The United Nations Human Rights Committee has expressed the view that the execution of juvenile offenders violates customary international law. United Nations Human Rights

[51] United Nations Sub-Commission on the Promotion and Protection of Human Rights, *The Death Penalty, Particularly in Relation to Juvenile Offenders*, 52d Sess., Res. 1999/4, U.N. Doc. E/CN.4/SUB.2/RES/1999/4 (1999).

[52] United Nations Sub-Commission on the Promotion and Protection of Human Rights, *The Death Penalty, Particularly in Relation to Juvenile Offenders*, 53d Sess., Res. 2000/17, U.N. Doc. E/CN.4/Sub.2/RES/2000/17 (2000).

Committee, General Comment No. 24 (52) Relating to Reservations, at ¶ 8.

In the view of the EU, the international documents cited above, in particular the rapid and near-universal acceptance of the CRC, dispel any doubt that there is wide agreement amongst States against the execution of persons below the age of 18. Whatever uncertainty may have existed in 1989, at the time of this Court's decision in *Stanford v. Kentucky*, it is now clear that throughout the western hemisphere and the rest of the world, there is an international consensus amongst nations against the execution of persons under the age of 18 at the time of the offense.

CONCLUSION

The arguments provided in the present Brief reveal the existence of an international consensus against the execution of persons who were below 18 years of age at the time of the offense. The U.S. position on the execution of juvenile offenders is out of step with the international community, which presents both legal and diplomatic issues. Harold Hongju Koh was U.S. Assistant Secretary of State for Democracy, Human Rights and Labor from 1998-2001. Upon his return to the faculty at Yale Law School, Professor Koh reflected on the importance of "telling the truth" in U.S. foreign policy. He concluded that "we need to tell the truth about those areas in which our national standards, and especially the standards of our several states, now fall below international human rights standards. Perhaps the prime area among these has been this country's administration of the death penalty against juveniles and retarded persons. . . . I can testify that these are no longer minor diplomatic irritants. Important meetings between America and its allies are increasingly consumed with answering official protests

against the death penalty. I have little doubt that America's continuation of the practice has undermined our claim to moral leadership in international human rights . . . ."[53]

In light of relevant international norms, the EU and its Member States, and Canada, the Council of Europe, Iceland, Liechtenstein, Mexico, New Zealand, Norway and Switzerland, respectfully support the position of Christopher Simmons, which seeks to strike down the imposition of the death penalty for all juvenile offenders under 18 years of age at the time of their offenses.

Respectfully submitted,

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[53] Harold Hongju Koh, *A United States Foreign Policy for the 21st Century*, 46 St. Louis U. L.J. 293, 309-310 (2002).

APPENDIX A

STATEMENT OF INTEREST
THE COUNCIL OF EUROPE

The Council of Europe, an international organisation composed of 45 European States, fully concurs with the opinions and arguments submitted by the European Union. The Council of Europe has taken the firm position that everyone's right to life is a basic value and that the abolition of the death penalty is essential to the protection of this right and for the full recognition of the inherent dignity of all human beings. It is of the opinion that there exists an international consensus against the execution of persons who were below 18 years of age at the time of the offence.

APPENDIX B

STATEMENT OF INTEREST THE GOVERNMENT OF MEXICO

Of the seventy-three juvenile offenders currently incarcerated on death rows across the United States, three are Mexican nationals. Both Tonatihu Aguilar Saucedo, who was sixteen at the time of the offense for which he received the death penalty, and Martín Raúl Fong Soto, who was seventeen, were sentenced to death in Arizona. Osvaldo Regalado Soriano was sentenced to death in Texas for a crime committed when he was seventeen years old.

Mexico's interest in this case is twofold. First, Mexico shares the opinion of the European Union that the application of the death penalty to juvenile offenders violates established norms of international law, and seeks to express its opinion on that subject as a member of the international community. As a member of the Organization of American States, Mexico takes particular note of the decision by the Inter-American Commission on Human Rights in *Domingues v. United States*, in which the Commission found that the execution of juvenile offenders violates established norms of international customary law. Report No. 62/02, Case 12.285, OEA/Ser.L/V/II.116, Doc. 33, October 22, 2002. Mexico fully endorses the position of the Commission that the execution of juvenile offenders violates a norm of *jus cogens*, and is thus impermissible under contemporary human rights standards.

Second, Mexico has a vital stake in protecting the rights of Mr. Aguilar Saucedo, Mr. Fong Soto, and Mr. Regalado Soriano.

APPENDIX C

HUMAN RIGHTS COMMITTEE, GENERAL COMMENT NO. 24 (52)

General comment on issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under Article 41 of the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (1994).[1]

1. As of 1 November 1994, 46 of the 127 States parties to the International Covenant on Civil and Political Rights had, between them, entered 150 reservations of varying significance to their acceptance of the obligations of the Covenant. Some of these reservations exclude the duty to provide and guarantee particular rights in the Covenant. Others are couched in more general terms, often directed to ensuring the continued paramountcy of certain domestic legal provisions. Still others are directed at the competence of the Committee. The number of reservations, their content and their scope may undermine the effective implementation of the Covenant and tend to weaken respect for the obligations of States Parties. Is it important for States Parties to know exactly what obligations they, and other States Parties, have in fact undertaken. And the Committee, in the performance of its duties under either Article 40 of the Covenant or under the Optional Protocols, must know whether a State is bound by a particular obligation or to what extent. This will require a determination as to whether a unilateral statement is a reservation or an interpretative

[1] Adopted by the Committee at its 1382nd meeting (fifty-second session) on 2 November 1994.

declaration and a determination of its acceptability and effects.

2. For these reasons the Committee has deemed it useful to address in a General Comment the issues of international law and human rights policy that arise. The General Comment identifies the principles of international law that apply to the making of reservations and by reference to which their acceptability is to be tested and their purport to be interpreted. It addresses the role of States Parties in relation to the reservations of others. It further addresses the role of the Committee itself in relation to reservations. And it makes certain recommendations to present States Parties for a reviewing of reservations and to those States that are not yet parties about legal and human rights policy considerations to be borne in mind should they consider ratifying or acceding with particular reservations.

3. It is not always easy to distinguish a reservation from a declaration as to a States's understanding of the interpretation of a provision, or from a statement of policy. Regard will be had to the intention of the State, rather than the form of the instrument. If a statement, irrespective of its name or title, purports to exclude or modify the legal effect of a treaty in its application to the State, it constitutes a reservation.[2] Conversely, if a so-called reservation merely offers a State's understanding of a provision but does not exclude or modify that provision in its application to that State, it is, in reality, not a reservation.

4. The possibility of entering reservations may encourage States which consider that they have difficulties in guaranteeing all the rights in the Covenant nonetheless to accept the generality of obligations in that instrument.

[2] Article 2(1) (d). Vienna Convention on the Law of Treaties 1969.

Reservations may serve a useful function to enable States to adapt specific elements in their laws to the inherent rights of each person as articulated in the Covenant. However, it is desirable in principle that States accept the full range of obligations, because the human rights norms are the legal expression of the essential rights that every person is entitled to as a human being.

5. The Covenant neither prohibits reservations nor mentions any type of permitted reservation. The same is true of the first Optional Protocol. The Second Optional Protocol provides, in article 2, paragraph 1, that "No reservation is admissible to the present Protocol, except for a reservation made at the time of ratification or accession that provides for the application of the death penalty in time of war pursuant to a conviction for a most serious crime of a military nature committed during wartime". Paragraphs 2 and 3 provide for certain procedural obligations.

6. The absence of a prohibition on reservations does not mean that any reservation is permitted. The matter of reservations under the Covenant and the first Optional Protocol is governed by international law. Article 19(3) of the Vienna Convention on the Law of Treaties provides relevant guidance.[3] It stipulates that where a reservation is not prohibited by the treaty or falls within the specified permitted categories, a State may make a reservation provided it is not incompatible with the object and purpose of the treaty. Even though, unlike some other human rights treaties, the Covenant does not incorporate a specific

[3] Although the Vienna Convention on the Law of Treaties was concluded in 1969 and entered into force in 1980 - i.e. after the entry into force of the Covenant - its terms reflect the general international law on this matter as had already been affirmed by the International Court of Justice in The Reservations to the Genocide Convention Case of 1951.

reference to the object and purpose test, that test governs the matter of interpretation and acceptability of reservations.

7. In an instrument which articulates very many civil and political rights, each of the many articles, and indeed their interplay, secures the objectives of the Covenant. The object and purpose of the Covenant is to create legally binding standards for human rights by defining certain civil and political rights and placing them in a framework of obligations which are legally binding for those States which ratify; and to provide an efficacious supervisory machinery for the obligations undertaken.

8. Reservations that offend peremptory norms would not be compatible with the object and purpose of the Covenant. Although treaties that are mere exchanges of obligations between States allow them to reserve *inter se* application of rules of general international law, it is otherwise in human rights treaties, which are for the benefit of persons within their jurisdiction. Accordingly, provisions in the Covenant that represent customary international law (and a fortiori when they have the character of peremptory norms) may not be the subject of reservations. Accordingly, a State may not reserve the right to engage in slavery, to torture, to subject persons to cruel, inhuman or degrading treatment or punishment, to arbitrarily deprive persons of their lives, to arbitrarily arrest and detain persons, to deny freedom of thought, conscience and religion, to presume a person guilty unless he proves his innocence, to execute pregnant women or children, to permit the advocacy of national, racial or religious hatred, to deny to persons of marriageable age the right to marry, or to deny to minorities the right to enjoy their own culture, profess their own religion, or use their own language. And while reservations to particular clauses of Article 14 may be acceptable, a general reservation to the right to a fair trial would not be.

9. Applying more generally the object and purpose test to the Covenant, the Committee notes that, for example, reservation to article 1 denying peoples the right to determine their own political status and to pursue their economic, social and cultural development, would be incompatible with the object and purpose of the Covenant. Equally, a reservation to the obligation to respect and ensure the rights, and to do so on a non-discriminatory basis (Article 2(1) would not be acceptable. Nor may a State reserve an entitlement not to take the necessary steps at the domestic level to give effect to the rights of the Covenant (Article 2(2)).

10. The Committee has further examined whether categories of reservations may offend the "object and purpose" test. In particular, it falls for consideration as to whether reservations to the non-derogable provisions of the Covenant are compatible with its object and purpose. While there is no hierarchy of importance of rights under the Covenant, the operation of certain rights may not be suspended, even in times of national emergency. This underlines the great importance of non-derogable rights. But not all rights of profound importance, such as articles 9 and 27 of the Covenant, have in fact been made non-derogable. One reason for certain rights being made non-derogable is because their suspension is irrelevant to the legitimate control of the state of national emergency (for example, no imprisonment for debt, in article 11). Another reason is that derogation may indeed be impossible (as, for example, freedom of conscience). At the same time, some provisions are non-derogable exactly because without them there would be no rule of law. A reservation to the provisions of article 4 itself, which precisely stipulates the balance to be struck between the interests of the State and the rights of the individual in times of emergency, would fall in this category. And some non-derogable rights, which in any event cannot

be reserved because of their status as peremptory norms, are also of this character - the prohibition of torture and arbitrary deprivation of life are examples.[4] While there is no automatic correlation between reservations to non-derogable provisions, and reservations which offend against the object and purpose of the Covenant, a State has a heavy onus to justify such a reservation.

11. The Covenant consists not just of the specified rights, but of important supportive guarantees. These guarantees provide the necessary framework for securing the rights in the Covenant and are thus essential to its object and purpose. Some operate at the national level and some at the international level. Reservations designed to remove these guarantees are thus not acceptable. Thus, a State could not make a reservation to article 2, paragraph 3, of the Covenant, indicating that it intends to provide no remedies for human rights violations. Guarantees such as these are an integral part of the structure of the Covenant and underpin its efficacy. The Covenant also envisages, for the better attainment of its stated objectives, a monitoring role for the Committee. Reservations that purport to evade that essential element in the design of the Covenant, which is also directed to securing the enjoyment of the rights, are also incompatible with its object and purpose. A State may not reserve the right not to present a report and have it considered by the Committee. The Committee's role under the Covenant, whether under article 40 or under the Optional Protocols, necessarily entails interpreting the provisions of the Covenant and the development of a jurisprudence. Accordingly, a reservation that rejects the Committee's competence to interpret the requirements of any provisions

[4] Reservations have been entered to both Article 6 and Article 7, but not in terms which reserve a right to torture or arbitrary to deprive of life.

of the Covenant would also be contrary to the object and purpose of that treaty.

12. The intention of the Covenant is that the rights contained therein should be ensured to all those under a State's party's jurisdiction. To this end certain attendant requirements are likely to be necessary. Domestic laws may need to be altered properly to reflect the requirements of the Covenant; and mechanisms at the domestic level will be needed to allow the Covenant rights to be enforceable at the local level. Reservations often reveal a tendency of States not to want to change a particular law. And sometimes that tendency is elevated to a general policy. Of particular concern are widely formulated reservations which essentially render ineffective all Covenant rights which would require any change in national law to ensure compliance with Covenant obligations. No real international rights or obligations have thus been accepted. And when there is an absence of provisions to ensure that Covenant rights may be sued on in domestic courts, and, further, a failure to allow individual complaints to be brought to the Committee under the first Optional Protocol, all the essential elements of the Covenant guarantees have been removed.

13. The issue arises as to whether reservations are permissible under the first Optional Protocol and, if so, whether any such reservation might be contrary to the object and purpose of the Covenant or of the first Optional Protocol itself. It is clear that the first Optional Protocol is itself an international treaty, distinct from the Covenant but closely related to it. Its object and purpose is to recognise the competence of the Committee to receive and consider communications from individuals who claim to be victims of a violation by a State party of any of the rights in the Covenant. States accept the substantive rights of individuals by reference to the Covenant, and not the first Optional

Protocol. The function of the first Optional Protocol is to allow claims in respect of those rights to be tested before the Committee. Accordingly, a reservation to an obligation of a State to respect and ensure a right contained in the Covenant, made under the first Optional Protocol when it has not previously been made in respect of the same rights under the Covenant, does not affect the State's duty to comply with its substantive obligation. A reservation cannot be made to the Covenant through the vehicle of the Optional Protocol but such a reservation would operate to ensure that the State's compliance with that obligation may not be tested by the Committee under the first Optional Protocol. And because the object and purpose of the first Optional Protocol is to allow the rights obligatory for a State under the Covenant to be tested before the Committee, a reservation that seeks to preclude this would be contrary to the object and purpose of the first Optional Protocol, even if not of the Covenant. A reservation to a substantive obligation made for the first time under the first Optional Protocol would seem to reflect an intention by the State concerned to prevent the Committee from expressing its views relating to a particular article of the Covenant in an individual case.

14 The Committee considers that reservations relating to the required procedures under the first Optional Protocol would not be compatible with its object and purpose. The Committee must control its own procedures as specified by the Optional Protocol and its rules of procedure. Reservations have, however, purported to limit the competence of the Committee to acts and events occurring after entry into force for the State concerned of the first Optional Protocol. In the view of the Committee this is not a reservation but, most usually, a statement consistent with its normal competence ratione temporis. At the same time, the Committee has insisted upon its competence, even in the face of such statements or observations, when events or acts

occurring before the date of entry into force of the first Optional Protocol have continued to have an effect on the rights of a victim subsequent to that date. Reservations have been entered which effectively add an additional ground of inadmissibility under article 5, paragraph 2, by precluding examination of a communication when the same matter has already been examined by another comparable procedure. Insofar as the most basic obligation has been to secure independent third party review of the human rights of individuals, the Committee has, where the legal right and the subject matter are identical under the Covenant and under another international instrument, viewed such a reservation as not violating the object and purpose of the first Optional Protocol.

15. The primary purpose of the Second Optional Protocol is to extend the scope of the substantive obligations undertaken under the Covenant, as they relate to the right to life, by prohibiting execution and abolishing the death penalty.[5] It has its own provision concerning reservations, which is determinative of what is permitted. Article 2, paragraph 1, provides that only one category of reservation is permitted, namely one that reserves the right to apply the death penalty in time of war pursuant to a conviction for a most serious crime of a military nature committed during wartime. Two procedural obligations are incumbent upon State parties wishing to avail themselves of such a reservation. Article 2, paragraph 1, obliges such a State to inform the Secretary General, at the time of ratification or accession, of the relevant provisions of its national legislation during warfare.

[5] The competence of the Committee in respect of this extended obligation is provided for under Article 5 - which itself is subject to a form of reservation in that the automatic granting of this competence may be reserved through the mechanism of a statement made to the contrary at the moment of ratification or accession.

This is clearly directed towards the objectives of specificity and transparency and in the view of the Committee a purported reservation unaccompanied by such information is without legal effect. Article 2, paragraph 3, requires a State making such a reservation to notify the Secretary General of the beginning or ending of a state of war applicable to its territory. In the view of the Committee, no State may seek to avail itself of its reservation (that is, have execution in time of war regarded as lawful) unless it has complied with the procedural requirement of article 2, paragraph 3.

16. The Committee finds it important to address which body has the legal authority to make determinations as to whether specific reservations are compatible with the object and purpose of the Covenant. As for international treaties in general, the International Court of Justice has indicated in the *Reservations to the Genocide Convention Case* (1951) that a State which objected to a reservation on the grounds of incompatibility with the object and purpose of a treaty could, through objecting, regard the treaty as not in effect as between itself and the reserving State. Article 20, paragraph 4, of the Vienna Convention on the Law of Treaties 1969 contains provisions most relevant to the present case on acceptance of and objection to reservations. This provides for the possibility of a State to object to a reservation made by another State. Article 21 deals with the legal effects of objections by States to reservations made by other States. Essentially, a reservation precludes the operation, as between the reserving and other States, of the provision reserved; and an objection thereto leads to the reservation being in operation as between the reserving and objecting State only to the extent that it has not been objected to.

17. As indicated above, it is the Vienna Convention on the Law of Treaties that provides the definition of reservations and also the application of the object and purpose test in the

absence of other specific provisions. But the Committee believes that its provisions on the role of State objections in relation to reservations are inappropriate to address the problem of reservations to human rights treaties. Such treaties, and the Covenant specifically, are not a web of inter-State exchanges of mutual obligations. They concern the endowment of individuals with rights. The principle of inter-State reciprocity has no place, save perhaps in the limited context of reservations to declarations on the Committee's competence under article 41. And because the operation of the classic rules on reservations is so inadequate for the Covenant, States have often not seen any legal interest in or need to object to reservations. The absence of protest by States cannot imply that a reservation is either compatible or incompatible with the object and purpose of the Covenant. Objections have been occasional, made by some States but not others, and on grounds not always specified; when an objection is made, it often does not specify a legal consequence, or sometimes even indicates that the objecting party nonetheless does not regard the Covenant as not in effect as between the parties concerned. In short, the pattern is so unclear that it is not safe to assume that a non-objecting State thinks that a particular reservation is acceptable. In the view of the Committee, because of the special characteristics of the Covenant as a human rights treaty, it is open to question what effect objections have between States inter se. However, an objection to a reservation made by States may provide some guidance to the Committee in its interpretation as to its compatibility with the object and purpose of the Covenant.

18. It necessarily falls to the Committee to determine whether a specific reservation is compatible with the object and purpose of the Covenant. This is in part because, as indicated above, it is an inappropriate task for States parties in relation to human rights treaties, and in part because it is a

task that the Committee cannot avoid in the performance of its functions. In order to know the scope of its duty to examine a State's compliance under article 40 or a communication under the first Optional Protocol, the Committee has necessarily to take a view on the compatibility of a reservation with the object and purpose of the Covenant and with general international law. Because of the special character of a human rights treaty, the compatibility of a reservation with the object and purpose of the Covenant must be established objectively, by reference to legal principles, and the Committee is particularly well placed to perform this task. The normal consequence of an unacceptable reservation is not that the Covenant will not be in effect at all for a reserving party. Rather, such a reservation will generally be severable, in the sense that the Covenant will be operative for the reserving party without benefit of the reservation.

19. Reservations must be specific and transparent, so that the Committee, those under the jurisdiction of the reserving State and other States parties may be clear as to what obligations of human rights compliance have or have not been undertaken. Reservations may thus not be general, but must refer to a particular provision of the Covenant and indicate in precise terms its scope in relation thereto. When considering the compatibility of possible reservations with the object and purpose of the Covenant, States should also take into consideration the overall effect of a group of reservations, as well as the effect of each reservation on the integrity of the Covenant, which remains an essential consideration. States should not enter so many reservations that they are in effect accepting a limited number of human rights obligations, and not the Covenant as such. So that reservations do not lead to a perpetual non-attainment of international human rights standards, reservations should not systematically reduce the obligations undertaken only to the

presently existing in less demanding standards of domestic law. Nor should interpretative declarations or reservations seek to remove an autonomous meaning to Covenant obligations, by pronouncing them to be identical, or to be accepted only insofar as they are identical, with existing provisions of domestic law. States should not seek through reservations or interpretative declarations to determine that the meaning of a provision of the Covenant is the same as that given by an organ of any other international treaty body.

20. States should institute procedures to ensure that each and every proposed reservation is compatible with the object and purpose of the Covenant. It is desirable for a State entering a reservation to indicate in precise terms the domestic legislation or practices which it believes to be incompatible with the Covenant obligation reserved; and to explain the time period it requires to render its own laws and practices compatible with the Covenant, or why it is unable to render its own laws and practices compatible with the Covenant. States should also ensure that the necessity for maintaining reservations is periodically reviewed, taking into account any observations and recommendations made by the Committee during examination of their reports. Reservations should be withdrawn at the earliest possible moment. Reports to the Committee should contain information on what action has been taken to review, reconsider or withdrawn reservations.

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CASES:

Atkins v. Virginia, 536 U.S. 304 (2002) 7

Browning-Ferris Industries of Vermont, Inc v. Kelco Disposal, Inc., 492 U.S. 257 (1989) 8

Coker v. Georgia, 433 U.S. 584 (1977) 24

Enmund v. Florida, 458 U.S. 782 (1982) 6, 24

Ferguson v. Georgia, 365 U.S. 570 (1961) 8

Filartiga v. Peña-Irala, 630 F.2d 876 (2d Cir. 1980) 21

Forti v. Suarez-Mason, 672 F. Supp. 1531 (N.D. Cal. 1987) 21

Grutter v. Bollinger, 539 U.S. 306 (2003) 6

In re Estate of Ferdinand E. Marcos Human Rights Litigation, 25 F.3d 1467 (9th Cir. 1994) 23

In re Estate of Ferdinand E. Marcos Human Rights Litigation, 978 F.2d 493 (9th Cir. 1992) 23

Lareau v. Manson, 507 F. Supp. 1177 (D. Conn. 1980) 25

Lawrence v Texas, 539 U.S. 558 (2003) 6, 8

Siderman de Blake v. Republic of Argentina, 965 F.2d 699 (9th Cir. 1992) 21, 23

Stanford v. Kentucky, 492 U.S. 361 (1989) 7

The Paquete Habana, 175 U.S. 677 (1900) 22, 24

Thompson v. Oklahoma, 487 U.S. 815 (1988) 7

Trop v. Dulles, 356 U.S. 86 (1958) 4, 7, 24

United States v. *Lee*, 106 U.S. 196 (1882) 8

TABLE OF AUTHORITIES—Continued

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United States v. Mata-Ballesteros, 71 F.3d 754 (9th Cir. 1995) 23

White v. Paulson, 997 F. Supp. 1380 (E.D. Wash. 1998) 23

Xuncax v. Gramajo, 886 F. Supp. 162 (D. Mass. 1995) 21

CONSTITUTION:

U.S. Const. amend. VIII ..... *passim*

RULES:

Sup. Ct. R. 37.2(a) 1

TREATIES:

American Convention on Human Rights, Nov. 22, 1969, art. 4, 1144 U.N.T.S. 123 14

Convention on the Rights of the Child, Nov. 20, 1989, art. 37(a), 1577 U.N.T.S. 3 ..... 14, 17, 18

Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 68, 75 U.N.T.S. 286 14

International Covenant on Civil & Pol. Rights, Dec. 16, 1966, 999 U.N.T.S. 171 ..... *passim*

Vienna Convention on the Law of Treaties, May 23, 1969, art. 53, 1155 U.N.T.S. 331, 3529 ..... 13, 17, 23

OTHER AUTHORITIES:

John Adams, A Defence of the Constitutions of Government of the United States of America, Preface, Grosvenor Square (January 1, 1797) (http://www.constitution.org/jadams/ja1_00.htm) 6

TABLE OF AUTHORITIES—Continued

Page

Amnesty International Report 2001, Annual Summaries 2001, AI Index:POL 10/006/2001 ..... 19, 21

Amnesty International, Children and the Death Penalty: Executions Worldwide Since 1990, ACT 50/010/2000 20

Amnesty International, *Death Penalty News, December 2001*, AI Index: ACT 53/001/2002 (January 2, 2002) 19

Amnesty International, *Dem. Republic of Congo: Killing Human Decency*, AI Index: AFR 62/11/00, at 12, May 31, 2000 21

Amnesty International, *Execution of Child Offenders: Updated Summary of Cases*, Press Release, February 16, 2004, (http://news.amnesty.org/mavp/news.nsf/print/ENGPOL300062004) 19

Amnesty International, Iran: Amnesty International calls on Iran to halt executions of child offenders, AI Index: MDE 13/005/2004 (Jan. 28, 2004) 19, 20

Amnesty International, *Report 2001*, AI Index: POL 10/001/2001 ..... 19, 21

Amnesty International, *Too Young to Vote, Old Enough to be Executed*, AI Index: AMR 51/105/2001 (June 2001) 19

Amnesty International Irish Section, *Pakistan: Young Offenders Taken Off Death Row*, AI Index: ASA 33/029/2001 (Dec. 13, 2001) 19

Napoleon Beazley v. United States, Inter-Am. C.H.R., 101/03, Merits Case 12.412, (2003); (http://www.cidh.org.org/annualrep/2003eng/usa.11412.htm) 17

Harry A. Blackmun, The Supreme Court and the Law of Nations, 104 Yale L.J. 39 (1994) ..... *passim*

TABLE OF AUTHORITIES—Continued

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Lea Brilmayer, International Law in American Courts: A Modest Proposal, 100 Yale L. J. 2277, 2284 (1991) 22

Children Act of 1908, 8 Edw. 7 (Eng.) 10

Children and Young Person's Act of 1933 (Eng.) 11

Gordon A. Christenson, Using Human Rights Law to Inform Due Process and Equal Protection Analyses, 52 U. Cin. L. Rev. 3 (1993) 25

Comments on United States of America, Hum. Rts. Comm, 53rd Sess., U.N. Doc. CCPR/C/79/Add 50 at pp 14 & 27 (1995) 12

Crime prevention and criminal justice: Capital punishment and the implementation of the safeguards guaranteeing protection of the rights of those facing the death penalty, Report of the Secretary General, U.N. ESCOR, Economic and Social Council, Subst. Sess., U.N. Doc. E/2000/3 at 21 (2000) 18, 20

Connie de la Vega, Amici Curiae Urge the U.S. Supreme Court to Consider International Human Rights Law in Juvenile Death Penalty Claim, 42 Santa Clara L. Rev. 1041 (2002) 12

The Death Penalty in Relation to Juvenile Offenders, U. N. Sub-Comm'n on the Promotion and Protection of Human Rights, 53rd Sess., Resolution 2000/17, adopted August 17, 2000, U.N. Doc. E/CN.4/Sub.2/RES/2000/17 (2000) 16

The Death Penalty, Particularly in Relation to Juvenile Offenders, U.N. Sub-Comm'n on the Promotion and Protection of Human Rights, 52nd Sess., Resolution 1999/4, adopted August 24, 1999, U.N. Doc. E/CN.4/Sub.2/RES/1999/4 (1999) 16

TABLE OF AUTHORITIES—Continued

Page

Death Sentences of Five Children Commuted to Life Imprisonment, OMCT-World Organization Against Torture, Case COD 270401.1.CC, 31 May 2001 21

The Declaration of Independence (U.S. 1777) 4

Michael Domingues v. United States, Inter-Am. C.H.R., 62/02, Merits Case 12.285 (2002) (http://wwwcidh.org/ annualrep/2003eng/USA.12285.htm) 17

Benjamin Franklin, The Debates on the Federalist Convention of 1787, Reported by James Madison (Sept. 17, 1787), (http://www.usconstitution.net/ franklin.html) 5

Ruth Bader Ginsburg & Deborah Jones Merritt, *Affirmative Action: An International Human Rights Dialogue*, 1 Rutgers Race & L. Rev. 193 (1999) 25

Gary Graham v. United States, Inter-Am, C.H.R., 97/03, Merits Case No. 11.193, (2003) (http://www.cidh.org/ annualrep/2003eng/usa.11193.htm)) 17

Louis Henkin, Foreign Affairs and the Constitution 223 (1972) 23

Louis Henkin, *International Law as Law in the United States*, 82 Mich. L. Rev. 1555, 1561 (1984) 22

Human Rights in the Administration of Justice, in Particular Juvenile Justice, Comm. on Hum. Rts., 58th Sess. Resolution 2002/47, adopted April 23, 2002, U.N. Doc. E/CN.4/RES/2002/47 ¶ 19 (2002) 15, 16

TABLE OF AUTHORITIES—Continued

Page

Peter King, Decision-makers and Decision-making in the English Criminal Law, 1750-1800, 27 Historical Journal 25 Cambridge Univ. Press, (1984) 9

Harold Hongju Koh, *Is International Law Really State Law?*, 111 Harv. L. Rev. 1824 (1998) 22

Richard B. Lillich, *The United States Constitution and International Human Rights Law*, 3 Harv. Hum. Rts J. 53, 69-70 (1990) 22, 23

Jordan J. Paust, Customary International Law and Human Rights Treaties are Law of the United States, 20 Mich. J. Int'l L. 301 (1999)) 23

Powers of Criminal Courts (Sentencing) Act 2000 (Eng.) 10

The Question of the Death Penalty, Comm. on Hum. Rts., 60th Sess., Resolution 2004/67, adopted April 22, 2004, U.N. Doc. E/CN.4/RES/2004/67 (2004) 14

The Question of the Death Penalty, Comm. on Hum. Rts., 59th Sess., Resolution 2003/67, adopted April 24, 2003, U.N. Doc. E/CN.4/RES/2003/67 (2003) 14

The Question of the Death Penalty, Comm. On Hum. Rts., 58th Sess. Resolution 2002/77, adopted April 25, 2002, U.N. Doc. E/CN.4/RES/2002/77 (2002) 14, 15

The Question of the Death Penalty, Comm. on Hum. Rts., 57th Sess. Resolution 2001/68, adopted April 25, 2001, U.N. Doc. E/CN.4/RES/2001/68 (2001) 15

TABLE OF AUTHORITIES—Continued

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The Question of the Death Penalty, Comm. on Hum. Rts., 56th Sess. Resolution 2000/65, adopted April 27, 2000, U.N. Doc. E/CN.4/RES/2000/65 (2000) 15

The Question of the Death Penalty, Comm. on Hum. Rts., 55th Sess. Resolution 1999/61, adopted April 28, 1999, U.N. Doc. E/CN.4/RES/1999/61 (1999) 15

The Question of the Death Penalty, Comm. on Hum. Rts., 54th Sess. Resolution 1998/8, adopted April 3, 1998, U.N. Doc. E/CN.4/RES/1998/8 (1998) 15

The Question of the Death Penalty, Comm. on Hum. Rts., 53rd Sess. Resolution 1997/12, adopted April 3, 1997, U.N. Doc. E/CN.4/RES/1997/12 (1997) 15

R v Secretary of State for the Home Department Ex parte Venables, [1998] A.C. 407 ..... *passim*

Sir Leon Radzinowicz & Roger G. Hood, *The Emergence of Penal Policy*, in 5 A History of English Criminal Law and Its Administration from 1750, Stevens & Sons Publishers (1986) 9

Report of the Departmental Committee on the Treatment of Young Offenders, 1927 Cmd 2831 10

Report of the Proceedings of the Committee of the Whole, May 21, 1968, U.N. Doc. A/Conf. 39/11 ..... 13, 17

Report of the Select Committee on Capital Punishment (1930) 10, 11

Restatement (Third) of the Foreign Relations Law § 102 (1986) ..... *passim*

TABLE OF AUTHORITIES—Continued

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Rights of the Child, Comm. on Hum. Rts. 60th Sess. Resolution 2004/48, adopted April 14, 2004, U.N. Doc. E/CN.4/RES/2004/48 (2004) 16

Rights of the Child, Comm. on Hum. Rts., 59th Sess. Resolution 2003/86, adopted April 25, 2003, U.N. Doc. E/CN.4/RES/2003/86 ¶ 35 (2003) 15

Rights of the Child, Comm. on Hum. Rts., 58th Sess. Resolution 2002/92, adopted April 26, 2002, U.N. Doc. E/CN.4/RES/2002/92 ¶ 31(a) (2002) 15

Rights of the Child, Comm. on Hum. Rts., 57th Sess., Resolution 2001/75, adopted April 25, 2001, U.N. Doc. E/CN.4/RES/2001/75 ¶ 28(a) (2001) 16

Rights of the Child: Status of the Convention on the Rights of the Child, Report of the Secretary General, U.N. ESCOR, Hum. Rts. Comm., 54th Sess., Agenda Item 20, 2, U.N. Doc. E/CN.4/1998/99 (1997) 18

Royal Commission on Capital Punishment 1949-1954 (1956) 10

Safeguards Guaranteeing Protection of the Rights of those Facing the Death Penalty, E.S.C. Res. 1984/50, annex, 1984 U.N. ESCOR Supp. No. 1, at 33, U.N. Doc. E/1984/84 (1984) 14

A. W. B. Simpson, Report prepared for submission to the European Court of Human Rights in *Prem Singh v. United Kingdom* 11

TABLE OF AUTHORITIES—Continued

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Statement of Conrad Harper, Legal Advisor, U.S. Department of State, U.N. GAOR, Hum. Rts. Comm., 53rd Sess., 1405th mtg., U.N. Doc. HR/CT/404 (1995) 25

Statement by the Press Secretary to the President of the United States, September 25, 2003, (http://www.usembassy.org.uk/bush283.html) 8

Summary Record of the 53rd meeting of the Commission on Human Rights, 56th Sess., April 17, 2000, U.N. Doc. E/CN.4/2000/SR.53, 88 and 92 (2000) 20

Summary Record of the 6th Meeting of the Sub-Commission on the Promotion and Protection of Human Rights, 52d Sess., August 4, 2000, U.N. Doc. E/CN.4/Sub.2/ 2000/SR.6 ¶ 39 (2000) 20

Douglas Christopher Thomas v. United States, Inter-Am. C.H.R., 100/03, Merits Case No. 12.240, (2003) (http://www.cidh.org/annualrep/2003/eng/usa.122240.htm) 17

United Nations Press Release, Commission on Human Rights Adopts Resolution on Situation in Iraq; Concludes Substantive Work, April 25, 2003 15

United Nations Press Release, Commission on Human Rights Starts Debate on Specific Groups and Individuals, April 11, 2001 20

United Nations Standard Minimum Rules for the Administration of Juvenile Justice, G.A. Res. 40/33, annex, 40 U.N. GAOR Supp. No. 53, at 207, U.N. Doc. A/40/53 (1985) 14

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STATEMENT OF INTEREST

Human Rights Committee of the Bar of England and Wales, Human Rights Advocates, Human Rights Watch, and the World Organization for Human Rights USA hereby request that this Court consider the present brief pursuant to Sup. Ct. Rule 37.2(a) in support of Respondent.[1] The interests of *amici* are described in detail in the Appendix.

[1] Letters from both counsel consenting to the filing of this brief are being sent with this brief to the Clerk of the Court. Counsel for

Amici urge the Court to consider international law and opinion when applying the Eighth Amendment's clause prohibiting cruel and unusual punishment. The importance of recognizing international law and treaty standards as they relate to the execution of persons who were under 18 at the time the committed their crime ("the juvenile death penalty") is imperative to the future of domestic compliance with international norms, and those international laws and norms are an important indicator of how community standards regarding the juvenile death penalty have evolved. Failure to comply with those norms is isolating the United States as the lone violator in the world. Incorporation into the Eighth Amendment of the almost universal prohibition against the juvenile death penalty would bring the United States into compliance with one of the most widely accepted human rights norms.

SUMMARY OF ARGUMENT

International law and opinion have informed the law of the United States from the Declaration of Independence forward. The Founders were greatly influenced by international legal and social thought; and throughout the history of this country, courts have referred to international standards in considering the permissibility of practices under the Constitution. This is particularly true with respect to the Eighth Amendment's cruel and unusual punishment clause. Of particular relevance have been the law and opinions of the United Kingdom.

Thus, *amici* consider the history of treatment of juveniles in the United Kingdom, as well as the status of the international law and practice with respect to the juvenile death

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a party did not author this brief in whole or in part. No person or entity, other than the *amici curiae*, their members, or their counsel made a monetary contribution to the preparation and submission of this brief.

penalty, to be of particular interest to this Court. With respect to the former, very few juveniles were ever executed in the United Kingdom. In 1933, the execution of those aged 18 at time of sentence was forbidden, and in 1948 the death penalty was prohibited for those who were under 18 at the time of the offense. These developments took place at a time when the death penalty for adults was still allowed.

Similarly, virtually every other country in the world has rejected the practice of executing juvenile offenders. The prohibition against the execution of persons who were under 18 years of age at the commission of the crime is now not only customary international law, it has attained the status of *jus cogens*, a peremptory norm of international law. No other nation has executed juvenile offenders at the rate practiced in the United States. And, while a handful of other nations have executed juvenile offenders in the past 15 years, those countries have either changed their laws raising the age to 18 or have in other ways accepted the norm.

Amici urge this Court to consider the history and laws of the United Kingdom, international law generally, and the *jus cogens* norm in particular in determining that under the Eighth Amendment's clause prohibiting cruel and unusual punishment, standards have now evolved to prohibit the juvenile death penalty.

ARGUMENT

I. INTERNATIONAL LAW AND OPINION FORM A BASIS OF LAW AND GOVERNMENT IN THE UNITED STATES

From the beginning, the laws of the United States have been informed and shaped by laws and opinions of other members of the international community. Indeed, the Declaration of Independence itself speaks to the significance of other nations: "When in the course of human events, it becomes necessary for one people to dissolve the political

bands which have connected them with another, and to assume among the powers of the earth, the separate and equal station to which the Laws of Nature and of Nature's God entitle them, *a decent respect to the opinions of mankind* requires that they should declare the causes which impel them to the separation." The Declaration of Independence para. 1 (U.S. 1776) (emphasis added).

In urging courts to afford the intended "decent respect to the opinions of mankind," Justice Blackmun has explained that:

> [T]he early architects of our Nation understood that the customs of nations—the global opinions of mankind—would be binding upon the newly forged union. John Jay, the first Chief Justice of the United States, observed . . . that the United States "had, by taking a place among the nations of the earth, become amenable to the laws of nations."

Harry A. Blackmun, *The Supreme Court and the Law of Nations*, 104 Yale L.J. 39 (1994) (citation and footnotes omitted).

In fact, the very constitutional provision at issue in this case—the Eighth Amendment's prohibition on "cruel and usual punishment inflicted"—traces its origin directly to the laws of another nation. The foundation for the phrase "cruel and unusual" stemmed from the "Anglo-American tradition of criminal justice." *Trop v. Dulles*, 356 U.S. 86, 100 (1958). The phrase was taken directly from the English Declaration of Rights of 1688, and the principle itself came from the Magna Carta. *Id.* For this reason, the Amendment's meaning must be drawn from the "evolving standards of decency that mark the progress of a maturing society." *Id.* at 101.

Thomas Jefferson, the drafter of the Declaration of Independence, had a keen appreciation for international opinion and law. Accordingly, the Declaration of Independence reflects a broad understanding of eighteenth century political

thought, and was greatly influenced by French, English, and Scottish Enlightenment philosophers and their understanding of ancient Greek democracy and the Roman Republic. Jefferson's belief in the social contract came from British political philosopher John Locke and Christian Wolff of Germany.

Likewise, other Founders used their knowledge of international and social thought and enlightenment as they sought to create a more perfect Union. For example, Benjamin Franklin—the only person to sign all three founding documents, the Declaration of Independence, the Constitution and the Treaty of Paris—was versed in the writing of Aristotle, Plato, Cicero, Virgil, and St. Thomas Aquinas and was greatly influenced by the Assize of Clarendon, which in the year 1166 defined the rights and duties of courts and people in criminal cases. Revealing his humility, however, Franklin's speech on the last day of the constitutional convention recognized the role of the evolution of thought in connection with our laws and institutions:

> I confess that there are several parts of this constitution which I do not at present approve, but I am not sure I shall never approve of them. For having lived long, I have experienced many instances of being obliged by better information, or fuller consideration, to change opinions even on important subjects, which I once thought right, but found to be otherwise.

Benjamin Franklin, The Debates on the Federalist Convention of 1787, Reported by James Madison (Sept. 17, 1787), *available at* http://www.usconstitution.net/franklin.html.

Similarly, John Adams was sensitive to, and familiar with, international opinion as it related to the Nation's laws and institutions. During his time as Minister to Great Britain, Adams wrote a multi-volume defense of the new Constitution and its form of government answering many critics of the new republic. In it he demonstrates his deep knowledge

of various forms of governments and the necessity of selecting the best the world has to offer to create a better government.

> If Cicero and Tacitus could revisit the earth, and learn that the English nation had reduced the great idea to practice, and brought it nearly to perfection, by giving each division a power to defend itself by a negative; had found it the most solid and durable government, as well as the most free; had obtained, by means of it, a prosperity among civilized nations, in an enlightened age, like that of the Romans among barbarians: and that the Americans, after having enjoyed the benefits of such a constitution a century and a half, were advised by some of the greatest philosophers and politicians of the age to renounce it, and set up the governments of ancient Goths and modern Indians—what would they say? That the Americans would be more reprehensible than the Cappadocians, if they should listen to such advice.

John Adams, *A Defence of the Constitutions of Government of the United States of America*, Preface, Grosvenor Square (January 1, 1797), *available at* http://www.constitution.org/jadams/ja1_00.htm.

Consistent with the approach of the Founders, on a number of occasions and with increasing frequency, this Court has recognized the relevance of international norms when considering the permissibility of practices in this country. *See, e.g., Lawrence v. Texas*, 539 U.S. 558, 123 S. Ct. 2472, 2483 (2003) (noting that "the right [of adults to engage in intimate, consensual conduct] has been accepted as an integral part of human freedom in many other countries"); *Grutter v. Bollinger*, 539 U.S. 306, 344 (2003) (Ginsburg, J. concurring) (noting support for affirmative action policies in international law); *Enmund v. Florida*, 458 U.S. 782, 796 n.22 (1982) (considering international opinion in connection with felony murder). In particular, the Court has looked to the standards of the international community in determining

the contours of the Eighth Amendment's "cruel and unusual punishment" clause.[2] *See, e.g., Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002) (considering international community's rejection of death penalty for persons with mental retardation); *Trop*, 356 U.S. at 102 (noting "virtual unanimity" within international community that denationalization constituted cruel and unusual punishment); *Thompson v. Oklahoma*, 487 U.S. 815, 830 (1988) (Stevens, J., concurring) (noting opposition within international community to execution of people for crimes committed while they were 16 or younger); *Stanford v. Kentucky*, 492 U.S. 361, 370 n. 1 (1989) (Scalia, J.) (noting that "the practices of other nations, particularly other democracies, can be relevant to determining whether a practice uniform among our people is not merely an historical accident, but rather so implicit in the concept of ordered liberty that it occupies a place not merely in our mores, but, text permitting, in our Constitution as well"); *see also* Blackmun, *supra*, at 45-46. To view the evolving standard of decency in an isolated and insular domestic environment would be contrary to all that the drafters of the Constitution knew as essential to joining the ranks of nations. Applying the spirit of the Founders' to the issue of juvenile executions, it is apparent that the Founders would have soundly rejected this practice as contrary to enlightened political thought and the evolved standard of decency in international customary law. The Founders sought to elicit the very best from themselves, fellow citizens and universal mankind in creating the United States. They

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[2] "Refusing to consider international practice in construing the Eighth Amendment is convenient for a Court that wishes to avoid conflict between the death penalty and the Constitution. But it is not consistent with the Court's established construction of the Eighth Amendment. If the substance of the Eighth Amendment is to turn on the 'evolving standards of decency' of the civilized world, there can be no justification for limiting judicial inquiry to the opinions of the United States." Blackmun, *supra*, at 48.

were not concerned with the source of a just principle but rather with its value toward a just and honorable country. Similarly, this Court should consider domestic and international standards and recognize that the execution of juvenile offenders no longer has a place in an evolved society.

II. THE LAW AND OPINIONS OF THE UNITED KINGDOM ARE PARTICULARLY RELEVANT TO THIS COURT'S EIGHTH AMENDMENT ANALYSIS

Within the last year, a majority of this Court has noted that the United States shares values with "a wider civilization." *Lawrence*, 539 U.S. at ___, 123 S. Ct. at 2483. There can be little doubt that the United Kingdom, from whose laws the Eighth Amendment's prohibition on "cruel and unusual punishment" was borrowed, is an important part of that "wider civilization," and this Court should seek guidance from the United Kingdom's experience as it relates to the juvenile death penalty.

The close relationship between the United Kingdom and the United States has a long history and recent developments in world affairs have made that relationship even closer. The incumbent president has repeatedly commented on that close relationship and how it is based on shared values. *See* Statement by the Press Secretary to the President of the United States, September 25, 2003, *available at* http://www.usembassy.org.uk/bush283.html.

The United States not only shares fundamental values with the United Kingdom, but also a common law heritage. This has been recognized by this Court on numerous occasions. *See, e.g., Browning-Ferris Industries of Vermont, Inc., v. Kelco Disposal, Inc.*, 492 U.S. 257, 273 (1989), and *Ferguson v. Georgia*, 365 U.S. 570, 582 (1961). In particular, this Court has recognized that American legal doctrines "derived from the laws and practices of our English ancestors." *United States* v. *Lee*, 106 U.S. 196, 205 (1882).

Consequently, the experience of England and Wales in determining the permissibility of the juvenile death penalty can provide guidance for this Court.

A. Historically, Juvenile Offenders Were Treated with More Leniency Than Adults in the United Kingdom in the Application of the Death Penalty

Historically, the common law allowed for the sentence of death for juveniles who knew what they were doing was wrong, although such sentences were rarely carried out. One researcher examined 136 judges' reports for mercy in the years 1787 and 1790 and concluded that "[s]ympathy for the young was mentioned in judges' positive recommendations more frequently than any other factor except good character." Peter King, *Decision-makers and Decision-making in the English Criminal Law, 1750-1800*, 27 Historical Journal, at 25, 45, Cambridge Univ. Press, (1984). King's study of death sentences from 1782 to 1787 also demonstrated a decided bias against passing death sentences on youths below 18 years of age, and that even fewer actual executions of persons below the age of 18 were ever carried out. *Id.* 35-42 (Figures 1-4).

In the eighteenth century the practice of not carrying out executions of young people developed so as to suggest that anyone less than 16 should not be executed. Radzinowicz and Hood point out in their examination of reprieves from 1861-1881 that "[t]he circumstances which weighed heavily with the Home Secretary were . . . youth of the offender, particularly up to the age of 17." Sir Leon Radzinowicz & Roger G. Hood, *The Emergence of Penal Policy*, in 5 A History of English Criminal Law and Its Administration from 1750, at 697, Stevens & Sons Publishers (1986). The last 17-year-old to be executed in the United Kingdom was Joseph Morley in 1887.

The United Kingdom's reluctance to execute young people eventually was codified to prohibit the execution of those

under 16. Children Act of 1908, 8 Edw. 7, c. 67 (Eng.). The penalty introduced in place of execution was detention at Her Majesty's Pleasure, which is a penalty that the courts have only ever been able to impose in cases involving young people or "lunatics" and remains the penalty imposed for those convicted of murder when aged under 18. Powers of Criminal Courts (Sentencing) Act 2000, § 90 (Eng.).

The choice of detention at Her Majesty's Pleasure was a significant development. Parliament could have provided that young people were detained for life; instead, it decided to provide for a "less severe form of sentence." R v Secretary of State for the Home Department Ex parte Venables, [1998] A.C. 407 HL at 521 (Per Lord Steyn) (hereinafter "Venables"). In particular, "[t]here is built into the sentence [of detention at Her Majesty's Pleasure] a measure of leniency in view of the age of the offender at the time of the offence." Venables, [1998] A.C. 407 HL at 532 (Per Lord Hope of Craighead). The Children Act of 1908 Act was "a notable piece of legislation, enshrining as it did in almost every section the principle that a young offender shall receive different treatment from an adult." Report of the Departmental Committee on the Treatment of Young Offenders, 1927 Cmd 2831.

In practice, following the enactment of the Children Act of 1908, the common law appears to have developed so that there were no executions of those under 18 at the time of sentence. In fact, only three executions of persons aged 18-21 were subsequently performed—in 1904, 1922 and 1925. Royal Commission on Capital Punishment 1949-1954 (1956), Appendix 2 (hereinafter "Gower Commission Report"). Then in 1930, the Select Committee on Capital Punishment recommended that the minimum age for execution be raised to 21. Report of the Select Committee on Capital Punishment (1930) at ¶ 189 (hereinafter "The Atkin Committee"). In reaching that conclusion, The Atkin Committee referred to the fact that:

> [T]he emotional balance of young people under the age of 21 is unstable, and this instability reduces their responsibility, and that the instability of adolescents, which in some cases may even amount to a form of mental disorder is very often a factor in the crime.

The Atkin Committee, at ¶ 193. Subsequently, the Children and Young Person's Act of 1933 (Eng.) prevented the execution of those aged 18 at the date of sentence. In 1948, the Criminal Justice Act prohibited the execution of people who were under 18 at the time of the offense.

Significantly, the statutory developments described above took place at a time when British law still accepted that adults could and should be executed. As a consequence they did not reflect any general concerns about the use of the death penalty. Instead the statutory developments formed part of an "elaborate legislative scheme which reflected a general policy of treating young offenders quite differently from older ones." A. W. B. Simpson, Report prepared for submission to the European Court of Human Rights in *Prem Singh v. United Kingdom*, unreported, (21 February 1996), cited with approval in Venables [1998] A.C. 407 HL at 481 (Per Lord Goff). In particular, the statutory developments were intended to impose an obligation upon the courts imposing a sentence "to have regard not only to retribution, deterrence and prevention of risk but also to the welfare of the child offender himself." Venables [1998] A.C. 407 HL at 498–99 (Per Lord Browne-Wilkinson).

In other words, for many years the legal system in England and Wales has recognized that young people who commit a murder should be treated with greater leniency. This Court should follow suit and recognize that the execution of juvenile offenders is inconsistent with evolving standards of decency.

III. INTERNATIONAL LAW AND OPINION ALSO CONDEMN THE EXECUTION OF JUVENILE OFFENDERS

Not only should this Court consider the laws of the United Kingdom, but general international law as well. The practice of executing persons who were under 18 at the time of their offense has been rejected by every nation in the world except the United States. In fact, the prohibition against the juvenile death penalty has reached the level of a *jus cogens* norm, which is binding on the United States. In determining whether the United States Constitution permits the execution of juvenile offenders, the Supremacy Clause mandates that binding international law, and in particular the non-derogable norm prohibiting the execution of juvenile offenders, be considered. In any event, even if this Court were not to recognize that the *jus cogens* norm against the juvenile death penalty prohibits the execution of juvenile offenders, the uniformity of international law and opinion against the practice should weigh heavily in this Court's determination that the juvenile death penalty is inconsistent with the Eighth Amendment's prohibition on cruel and unusual punishment.[3]

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[3] *Amici* do not here address the issue of whether there are binding treaty obligations under article 6(5) International Covenant on Civil and Political Rights applicable to this case since it was not raised by the parties. While the United States ratified that treaty with a reservation to that article, the validity of the reservation is questionable because it violates the object and purpose of the treaty and violates a *jus cogens* norm. *See Comments on United States of America*, Hum. Rts. Comm, 53rd Sess., U.N. Doc. CCPR/C/79/Add 50 at pp. 14 & 27 (1995); *General Comment - Human Rights Committee*, General Comment No. 24, U.N. Doc. CCPR/C/21/Rev.1/Add. 6 (1994); *see also* Connie de la Vega, *Amici Curiae Urge the U.S. Supreme Court to Consider International Human Rights Law in Juvenile Death Penalty Claim*, 42 Santa Clara L. Rev. 1041, 1050-1056 (2002).

A. The Prohibition Is Now a *Jus Cogens* Norm

Under article 53 of the Vienna Convention, a *jus cogens* norm is "a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." Vienna Convention on the Law of Treaties, May 23, 1969, art. 53, 1155 U.N.T.S. 331, 352 (hereinafter "Vienna Convention"). The Restatement (Third) of the Foreign Relations Law agrees with this standard and provides that a *jus cogens* norm is a "norm accepted and recognized by the international community of States as a whole from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character," and that the norm is established where there is acceptance and recognition by a "large majority" of states, even if over dissent by a very small number of states. Restatement (Third) of the Foreign Relations Law § 102 & rptr. n. 6 (1986) (citing *Report of the Proceedings of the Committee of the Whole*, at 471-72, U.N. Doc. A/Conf. 39/11 (1968)). Hence, a norm must meet four requirements in order to attain the status of a peremptory norm: 1) it is general international law; 2) it is accepted by a large majority of states; 3) it is immune from derogation; and 4) it has not been modified by a new norm of the same status. The prohibition against the execution of offenders who were under 18 at the time they committed their offense meets those requirements.

1. The Prohibition is General International Law

First, the prohibition against the execution of persons who were under 18 at the time they committed their crime is generally accepted in international law. Numerous treaties, declarations, and pronouncements by international bodies, as well as the laws of the vast majority of nations, are evidence of that law. Among the treaties are the International Cove-

nant on Civil and Political Rights, article 6(5) (International Covenant on Civil & Pol. Rights, Dec. 16, 1966, art. 6(5), 999 U.N.T.S. 171 (hereinafter "International Covenant")), the Convention on the Rights of the Child, article 37(a) (Convention on the Rights of the Child, Nov. 20, 1989, art. 37(a), 1577 U.N.T.S. 3), the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, article 68 (Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 68, 75 U.N.T.S. 286 (hereinafter "Fourth Geneva Convention")), and the American Convention on Human Rights, Chapter 2, Article 4, Section 5 (American Convention on Human Rights, Nov. 22, 1969, art. 4, 1144 U.N.T.S. 123).

Similarly, a resolution by the United Nations Economic and Social Council opposed the imposition of the death penalty for juvenile offenders. *See Safeguards Guaranteeing Protection of the Rights of those Facing the Death Penalty*, E.S.C. Res. 1984/50, annex, 1984 U.N. ESCOR Supp. No. 1, at 33, U.N. Doc. E/1984/84 (1984). And in 1985, the United Nations General Assembly adopted by consensus the United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules"), which also oppose capital punishment for juveniles. G.A. Res. 40/33, annex, 40 U.N. GAOR Supp. No. 53, at 207, U.N. Doc. A/40/53 (1985).

The United Nations Commission on Human Rights since 1997 has passed annual resolutions calling on states "not to impose [the death penalty] for crimes committed by persons below 18 years of age." *See The Question of the Death Penalty,* Comm. on Hum. Rts., 60th Sess., Resolution 2004/67, adopted April 22, 2004, U.N. Doc. E/CN.4/RES/2004/67 (2004); *The Question of the Death Penalty*, Comm. on Hum. Rts., 59th Sess., Resolution 2003/67, adopted April 24, 2003, U.N. Doc. E/CN.4/RES/2003/67 (2003); *The Question of the Death Penalty*, Comm. On Hum. Rts., 58th Sess. Resolution

2002/77, adopted April 25, 2002, U.N. Doc. E/CN.4/RES/2002/77 (2002); *The Question of the Death Penalty*, Comm. on Hum. Rts., 57th Sess. Resolution 2001/68, adopted April 25, 2001, U.N. Doc. E/CN.4/RES/2001/68 (2001); *The Question of the Death Penalty*, Comm. on Hum. Rts., 56th Sess. Resolution 2000/65, adopted April 27, 2000, U.N. Doc. E/CN.4/RES/2000/65 (2000); *The Question of the Death Penalty*, Comm. on Hum. Rts., 55th Sess. Resolution 1999/61, adopted April 28, 1999, U.N. Doc. E/CN.4/RES/1999/61 (1999); *The Question of the Death Penalty*, Comm. on Hum. Rts., 54th Sess. Resolution 1998/8, adopted April 3, 1998, U.N. Doc. E/CN.4/RES/1998/8 (1998); *The Question of the Death Penalty*, Comm. on Hum. Rts., 53rd Sess. Resolution 1997/12, adopted April 3, 1997, U.N. Doc. E/CN.4/RES/1997/12 (1997).

Those Commission resolutions passed with a number of dissenting votes, reflecting the fact that they also called for a moratorium on the death penalty generally. Since a number of countries still have the death penalty—which is not prohibited by the International Covenant and the prohibition of which is not as widely accepted as the prohibition on the juvenile death penalty is—many countries opposed the broader moratorium. Other Commission resolutions that mention only the prohibition against the juvenile death penalty, however, passed by consensus. *See Rights of the Child,* Comm. on Hum. Rts., 59th Sess. Resolution 2003/86, adopted April 25, 2003, U.N. Doc. E/CN.4/RES/2003/86 ¶ 35 (2003),[4] *Rights of the Child*, Comm. on Hum. Rts., 58th Sess. Resolution 2002/92, adopted April 26, 2002, U.N. Doc. E/CN.4/RES/2002/92 ¶ 31(a) (2002); *Human Rights in the*

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[4] An effort by the United States to delete that paragraph lost by a vote of 51-1, See United Nations Press Release, *Commission on Human Rights Adopts Resolution on Situation in Iraq; Concludes Substantive Work*, April 25, 2003, Afternoon at 9-10.

Administration of Justice, in Particular Juvenile Justice, Comm. on Hum. Rts., 58th Sess. Resolution 2002/47, adopted April 23, 2002, U.N. Doc. E/CN.4/RES/2002/47 ¶ 19 (2002); *Rights of the Child*, Comm. on Hum. Rts., 57th Sess., Resolution 2001/75, adopted April 25, 2001, U.N. Doc. E/CN.4/RES/2001/75 ¶ 28(a) (2001). While the United States opposed the resolution in 2004, the resolution passed by a vote of 52-1. *See Rights of the Child*, Comm. on Hum. Rts. 60th Sess. Resolution 2004/48, adopted April 14, 2004, U.N. Doc. E/CN.4/RES/2004/48 (2004). Each of those resolutions requests governments to end the practice of executing juvenile offenders.

The United Nations Sub-Commission on the Promotion and Protection of Human Rights has passed similar resolutions condemning the juvenile death penalty. In 1999, the Sub-Commission specifically noted that the United States is one of only six countries that had executed juvenile offenders since 1990 and that it accounted for 10 of the 19 executions during that time period. *The Death Penalty, Particularly in Relation to Juvenile Offenders*, U.N. Sub-Comm'n on the Promotion and Protection of Human Rights, 52nd Sess., Resolution 1999/4, adopted August 24, 1999, U.N. Doc. E/CN.4/Sub.2/RES/1999/4 (1999). One year later, the Sub-Commission affirmed "that the imposition of the death penalty on those aged under 18 at the time of the commission of the offence is contrary to customary international law." *The Death Penalty in Relation to Juvenile Offenders*, U. N. Sub-Comm'n on the Promotion and Protection of Human Rights, 53rd Sess., Resolution 2000/17, adopted August 17, 2000, U.N. Doc. E/CN.4/Sub.2/RES/ 2000/17 (2000). Again, the latter resolution was adopted without a vote.

Other international bodies have reached the same conclusion. The Inter-American Commission on Human Rights—the body responsible for the protection of fundamental freedoms in the Organization of American States (OAS), an organization which includes the United States—found that a

jus cogens norm proscribes the execution of persons who were under 18 at the time of the commission of their crime. *Michael Domingues v. United States*, Inter-Am. C.H.R., 62/02, Merits Case 12.285 (2002) (http://wwwcidh.org/annualrep/2003eng/USA.12285.htm). The Inter-American Commission has since reaffirmed its ruling in *Domingues* several times. *See, e.g., Napoleon Beazley v. United States,* Inter-Am. C.H.R., 101/03, Merits Case 12.412, (2003); (http://www.cidh.org.org/annualrep/2003eng/usa.11412.htm) *Gary Graham v. United States*, Inter-Am, C.H.R., 97/03, Merits Case No. 11.193, (2003) (http://www.cidh.org/annualrep/2003eng/usa.11193.htm); *Douglas Christopher Thomas v. United States*, Inter-Am. C.H.R., 100/03, Merits Case No. 12.240, (2003) (http://www.cidh.org/annualrep/2003/eng/usa.122240.htm).

These treaties, declarations, resolutions, and pronouncements by international bodies demonstrate that the prohibition of the juvenile death penalty is now part of general international law.

2. The Prohibition Is Accepted by Every Other Country in the World

The second requirement for a *jus cogens* norm is satisfied in that the norm is accepted "by 'a very large majority of' States, even if over dissent by 'a very small number' of states." Restatement (Third) of Foreign Relations Law, § 102, rptr. n. 6 (interpreting the Vienna Convention and citing to *Report of the Proceedings of the Committee of the Whole*, *supra* at 471-72). The United States is the only country in the world that has not accepted the international norm against the execution of juvenile offenders. The only other countries known to have executed juvenile offenders in the last 10 years have since abolished the practice, acknowledged that such executions were contrary to their laws, or denied that they took place.

The United States' isolated stance on the issue of the juvenile death penalty is evidenced by the status of the Convention on the Rights of the Child. Almost every nation in the world has ratified that Convention. *See Rights of the Child: Status of the Convention on the Rights of the Child*, Report of the Secretary General, U.N. ESCOR, Hum. Rts. Comm., 54th Sess., Agenda Item 20, 2, U.N. Doc. E/CN.4/1998/99 (1997). In fact, the *only* States not to have ratified the Convention are the United States and Somalia—a country lacking a central government. *See Rights of the Child: Status of the Convention on the Rights of the Child*, U.N. ESCOR, 57th Sess., Agenda Item 13, U.N. Doc. E/CN.4/2001/74, 5 & Annex 1 (2000). Indeed, the Convention on the Rights of the Child has been the catalyst that has prompted many countries in the past 10 years to change their laws to raise the age of eligibility for the death penalty to 18. The United Nations reported that Barbados, Yemen, and Zimbabwe changed their laws in 1994. *See Crime prevention and criminal justice: Capital punishment and the implementation of the safeguards guaranteeing protection of the rights of those facing the death penalty, Report of the Secretary General*, U.N. ESCOR, Economic and Social Council, Subst. Sess., U.N. Doc. E/2000/3 at 21 (2000). Likewise, China changed its age for death penalty eligibility to 18 in 1997. *Id.* Indeed, by the time of that report in 2000, only 14 countries that had ratified the Convention had not formally changed their laws to incorporate the prohibition on the juvenile death penalty. *Id.*[5] None of those countries had placed reservations on the Convention's prohibition on the juvenile death penalty, and only six have executed juvenile offenders since 1991:

[5] The countries were Afghanistan, Burundi, Bangladesh, the Democratic Republic of the Congo, India, Iran, Iraq, Malaysia, Morocco, Myanmar, Nigeria (excepting Federal Law), Pakistan, the Republic of Korea, Saudi Arabia, and the United Arab Emirates. *Id.* at footnote 36.

Democratic Republic of the Congo (1 in 2000), Iran (6: 3 in 1992, 1 in 1999, 1 in 2000, 1 in 2001), Nigeria (1 in 1997), Pakistan (2: 1 in 1992, 1 in 1997), Saudi Arabia (1 in 1992), and Yemen (1 in 1993). Amnesty International, *Too Young to Vote, Old Enough to be Executed*, AI Index: AMR 51/105/2001 (June 2001). In addition, Amnesty International documented an execution in Pakistan on November 3, 2001 (Amnesty International, *Death Penalty News, December 2001*, AI Index: ACT 53/001/2002 (January 2, 2002)) and one in Iran on January 25, 2004 (Amnesty International, *Iran: Amnesty International calls on Iran to halt executions of child offenders,* AI Index: MDE 13/005/2004 (January 28, 2004).[6]

In each of the six other countries where juveniles have been executed since 1990, either the laws have been changed or the governments have denied that the executions of juvenile offenders took place. For example, the laws have changed in Yemen, as noted above, and Pakistan promulgated the Juvenile Justice System Ordinance in July 2000, banning the death penalty for anyone under 18 at the time of the crime. *Amnesty International Report* 2001, Annual Summaries 2001, page 186, AI Index:POL 10/006/2001. Since the passage of the Juvenile Justice System Ordinance, President Musharraf of Pakistan commuted the death sentences of approximately 100 young offenders to imprisonment in response to Amnesty International's Secretary General Irene Khan's request. Amnesty International Irish Section, *Pakistan: Young Offenders Taken Off Death Row*, AI Index: ASA 33/029/2001 (Dec. 13, 2001).

[6] Amnesty International also reported that a juvenile offender was executed in China in 2003, because the courts do not take sufficient care to determine the age of offenders. Amnesty International, *Execution of Child Offenders: Updated Summary of Cases*, Press Release, February 16, 2004, *available at* http://news.amnesty.org/mavp/news.nsf/print/ENGPOL300062004.

Nigeria, as noted in the United Nations report above, has national legislation setting the age at 18. *Crime Prevention and Criminal Justice*, *supra*. With respect to the execution in 1997, the Nigerian government insisted to the Sub-Commission on the Promotion and Protection of Human Rights last year that the offender was well over 18 at the time of the offense and reiterated that any juveniles convicted of capital offenses have their sentences commuted. *See Summary Record of the 6th Meeting of the Sub-Commission on the Promotion and Protection of Human Rights*, 52d Sess., August 4, 2000, U.N. Doc. E/CN.4/Sub.2/ 2000/SR.6 ¶ 39 (2000). Saudi Arabia has adamantly insisted at the Commission on Human Rights that the allegations regarding the execution of a juvenile in 1992 are untrue. *See Summary Record of the 53rd meeting of the Commission on Human Rights*, 56th Sess., April 17, 2000, U.N. Doc. E/CN.4/2000/SR.53, 88 and 92 (2000). While there has been documentation that the executions in Nigeria and Saudi Arabia did take place, *see*, Amnesty International, *Children and the Death Penalty: Executions Worldwide Since 1990*, ACT 50/010/2000, the denials by the governments are an indication that those countries have accepted the norm.

While executions of juvenile offenders seem to have taken place with more frequency in Iran, that government also has denied at the Commission on Human Rights that such executions take place. *See* United Nations Press Release, *Commission on Human Rights Starts Debate on Specific Groups and Individuals*, April 11, 2001 (Right of Reply by Representative of Iran). Furthermore, in December 2003, a bill establishing special courts for minors and removing provisions for the execution of child offenders was passed by the Iranian parliament and awaits ratification of the Guardian Council, the highest legislative body in Iran. *See* Amnesty International, *Iran: Amnesty International calls on Iran to halt executions of child offenders*, AI Index: MDE 13/005/2004 January 28, 2004.

Finally, the Democratic Republic of the Congo, which is in the midst of civil war, is also reported to have executed a juvenile offender in 2000, despite a moratorium on the death penalty in that country. *See* Amnesty International, *Dem. Republic of Congo: Killing Human Decency*, AI Index: AFR 62/11/00, at 12, May 31, 2000. However, that execution was carried out by the Military Order Court rather than through the judicial process. *Id.* In 2001, when four juvenile offenders were sentenced to death by the Military Order Court, the executions were stayed and the sentences commuted following appeals from the international community. *See Death Sentences of Five Children Commuted to Life Imprisonment*, OMCT-World Organization Against Torture, Case COD 270401.1.CC, 31 May 2001. Thus, it appears that even during wartime, the Democratic Republic of the Congo intends to comply with the international norm banning the juvenile death penalty.

Hence, the United States stands alone in not accepting the norm against the execution of juvenile offenders. Even if the reports that executions of juveniles took place not only in the United States but in Iran as well, the level of adherence to the norm is similar to those noted in the Restatement (Third) as having had attained peremptory status: rules prohibiting genocide, slave trade and slavery, apartheid and other gross violations of human rights. Restatement (Third) of the Foreign Relations Law, § 102 rptr. n.6, *supra*. And while United States courts have found the prohibition against torture to have attained the status of a *jus cogens* norm, *see, e.g., Siderman de Blake v. Republic of Argentina*, 965 F.2d 699 (9th Cir. 1992); *Filartiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980); *Xuncax v. Gramajo*, 886 F. Supp. 162 (D. Mass. 1995); *Forti v. Suarez-Mason*, 672 F. Supp. 1531 (N.D. Cal. 1987), Amnesty International found that 125 countries violated that norm in 2001. *Amnesty International Report* 2001, Annual Summaries 2001, AI Index:POL 10/006/2001. In stark contrast, only ~~two or~~ perhaps three

countries have violated the norm prohibiting the execution of juvenile offenders in the past year.

3. The Norm Is Non-Derogable

The prohibition against the juvenile death penalty is non-derogable. Among the indications of this fact is that the International Covenant expressly provides that there shall be no derogation from Article 6, which prohibits the imposition of the death penalty on juvenile offenders. *See* International Covenant, *supra*, art. 4. The express prohibition in the treaty coupled with the wide acceptance as evidenced by the resolutions and rulings of international bodies, and the laws and practice of other nations, support the conclusion that the norm is non-derogable.

4. There Is No Emerging Norm Modifying This Norm

As to the fourth and final requirement, there is no emerging norm that contradicts the current norm. The prohibition of the juvenile death penalty enjoys near universal acceptance. There is thus no question that the prohibition against the execution of persons who were under 18 at the time they committed their crime has attained the status of a *jus cogens* norm.

B. *Jus Cogens* Norms Are Binding in the United States

As this Court has noted, customary international law is "part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction." *The Paquete Habana*, 175 U.S. 677, 700 (1900). *See also* Lea Brilmayer, *International Law in American Courts: A Modest Proposal*, 100 Yale L. J. 2277, 2284 (1991); Louis Henkin, *International Law as Law in the United States*, 82 Mich. L. Rev. 1555, 1561 (1984); Harold Hongju Koh, *Is International Law Really State Law?*, 111 Harv. L. Rev. 1824 (1998); Richard B. Lillich, *The United States Constitution and International Human Rights Law*, 3 Harv. Hum. Rts J.

53, 69-70 (1990); Jordan J. Paust, *Customary International Law and Human Rights Treaties are Law of the United States*, 20 Mich. J. Int'l L. 301 (1999). In this regard, the Restatement (Third) provides that "[i]nternational law and international agreements of the United States are the law of the United States and supreme over the law of the several States" and "[c]ourts in the United States are bound to give effect to international law and to international agreements of the United States." Restatement (Third) of Foreign Relations Law, § 102. "[A]s in the case of treaties, American courts will give effect to the obligations of the United States under customary law; at the behest of affected private parties, courts will prevent violations of international law by the States." Louis Henkin, *Foreign Affairs and the Constitution* 223 (1972); *see also* Blackmun, *supra,* at 45-46.

The principle that customary international law is part of United States law applies with even greater force when considering a peremptory norm. *See, e.g., United States v. Mata-Ballesteros*, 71 F.3d 754 (9th Cir. 1995); *In re Estate of Ferdinand E. Marcos Human Rights Litigation ["Marcos II"]*, 25 F.3d 1467 (9th Cir. 1994); *In re Estate of Ferdinand E. Marcos Human Rights Litigation ["Marcos I"]*, 978 F.2d 493 (9th Cir. 1992); *White v. Paulson*, 997 F. Supp. 1380 (E.D. Wash. 1998). As the United States Court of Appeals for the Ninth Circuit noted in *Siderman de Blake v. Argentina*, courts of this country are obligated to enforce *jus cogens* norms. *Siderman de Blake*, 965 F.2d at 715-16. The Ninth Circuit observed that "[b]ecause *jus cogens* norms do not depend solely on the consent of states for their binding force, they 'enjoy the highest status within the international law.' [Citation omitted.] For example, a treaty that contravenes *jus cogens* is considered . . . to be void." *Id.* at 715 (citing to the Vienna Convention).

This Court should likewise recognize that the *jus cogens* norm against the juvenile death penalty is binding on this country and at the very least is relevant to determining the

parameters of the evolving standards under the Eighth Amendment.[7]

C. The *Jus Cogens* Norm is Enforceable Through the Eighth Amendment

As mentioned above, this Court has repeatedly recognized the relevance of international law and opinion when considering the evolving standards of decency under the Eighth Amendment. *See, e.g., Enmund*, 458 U.S. at 796 n.22 (death penalty may not be imposed for felony murder, citing the experience of Commonwealth and Western European countries); *Coker v. Georgia*, 433 U.S. 584, 596 (1977) (international opinion was relevant in finding that the death penalty for rape violated the Eighth Amendment); *Trop*, 356 U.S. at 102, 126 (foreign state practices were deemed relevant to the determination that denaturalization of a military deserter constituted cruel and unusual punishment). The Court should recognize in this case as well that the uniform rejection by the rest of the world of the practice of executing juveniles is weighty evidence that this practice is inconsistent with evolving standards of decency. At a minimum, the international consensus is relevant to determining that the very rare usage of the juvenile death penalty, even in the United States itself, "is not merely an historical accident" but instead the practice runs afoul of the Eighth Amendment's prohibition on "cruel and unusual punishment."

Moreover, international human rights standards have often been useful tools for interpreting laws in the United States.

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[7] While the Court in the *Paquete Habana* noted that customary international law is looked to "where there is no treaty, and no controlling executive or legislative act or judicial decision," 175 U.S. 677, 700 (1900), that does not preclude courts from considering customary international law or *jus cogens* norms to determine whether evolving standards of decency under the Eighth Amendment do include, in the words of the First Chief Justice, "the law of nations."

See, e.g., Lareau v. Manson, 507 F. Supp. 1177, 1189 (D. Conn. 1980); *see generally*, Ruth Bader Ginsburg & Deborah Jones Merritt, *Affirmative Action: An International Human Rights Dialogue*, 1 Rutgers Race & L. Rev. 193 (1999); Gordon A. Christenson, *Using Human Rights Law to Inform Due Process and Equal Protection Analyses*, 52 U. Cin. L. Rev. 3 (1993). Indeed, the United States government told the Human Rights Committee that "the courts could refer to the Covenant and take guidance from it." Statement of Conrad Harper, Legal Advisor, U.S. Department of State, U.N. GAOR, Hum. Rts. Comm., 53rd Sess., 1405th mtg., U.N. Doc. HR/CT/404 (1995). The strong consensus against the execution of juvenile offenders that runs throughout international law—and that in particular is embodied in the International Covenant, a treaty to which the United States is a party—is strong evidence that the execution of juvenile offenders is in fact cruel and unusual punishment.

CONCLUSION

There is no clearer precept in international law than the prohibition of the death penalty for juvenile offenders. The United States cannot continue to demand compliance with human rights principles and norms abroad while it refuses to apply them in its own country. As the final arbiter of the meaning of the Eighth Amendment, this Court has the obligation to consider whether indeed the principles embraced by the rest of the world must be applied here as well. Most if not all other countries of the world now prohibit the execution of offenders who were under 18 at the time of the commission of their crime. In this case, the Supreme Court of the State of Missouri has determined that indeed the standards under the Eighth Amendment have evolved to comply with what is now a peremptory norm of international law. Its judgment should be upheld.

Respectfully submitted,

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APPENDIX

Human Rights Advocates, a California non-profit corporation, founded in 1978, with national and international membership, endeavors to advance the cause of human rights to ensure that the most basic protections are afforded to everyone. Human Rights Advocates has a Special Consultative Status in the United Nations and has participated at the meetings of the Commission on Human Rights. Human Rights Advocates has submitted briefs as *amicus curiae* in cases involving individual and group rights where international standards offer assistance in interpreting both state and federal statutes at issue. Examples of *amicus* briefs that Human Rights Advocates has filed include those in the following cases: *Gutter v. Bollinger*, 539 U.S. 306 (2003); *Domingues v. Nevada*, No. 98-8327, *cert. denied*, 528 U.S. 963 (1999); *Coalition for Economic Equity v. Wilson*, 110 F.3d 1431 (9th Cir.), *cert. denied*, 522 U.S. 963 (1997); *Cal. Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272 (1987); *Hilao v. Estate of Marcos*, 103 F.3d 789 (9th Cir. 1996).

Human Rights Watch is a non-governmental organization established in 1978 to monitor and promote observance of internationally recognized human rights. It also has a Special Consultative Status in the United Nations. It regularly reports on human rights conditions in more than 70 countries around the world, and it actively promotes legislation and policies worldwide that advance protections in the area of domestic and international human rights and humanitarian law.

The Bar of England and Wales, through the Human Rights Committee, appears on behalf of persons whose human rights are endangered. The Human Rights Committee is nonpolitical and nonpartisan. Its guiding principle is the belief that no person should be punished for any crime except after a trial and appeals process that accords with the highest standards for fairness and the rule of law. The Bar Council seeks to set

out international standards in the hope that international, English, British Commonwealth and European Court of Human Rights sources may be of assistance to this Court. Those international standards are especially relevant because the United States has ratified the International Covenant on Civil and Political Rights, thus evincing a sincere concern for the norms of international law.* Further, the comity among the common-law nations makes the experience of each persuasive to the other. In particular, the courts of the United States and of England have often looked to each other for guidance. For example, the United States Supreme Court in *Enmund v. Florida*, 458 U.S. 782, 816 n.29 (1982), specifically recognized the influence of international opinion and relied upon it to guide its determination. The Court noted that the felony murder doctrine had been abolished in England.

The World Organization for Human Rights USA (WOHR) (formerly the World Organization Against Torture USA) is an international human rights organization focusing on the issue of torture (defined under the Convention Against Torture as "severe pain or suffering") and the United States' compliance with international human rights standards. In light of this experience, and its close association with an international human rights network focused on these issues, WOHR can assist the Court in its consideration of this case. WOHR believes that its input, reflective of its international

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* In submitting his proposal for the ratification of the International Covenant to the Senate for its advice and consent, President George H.W. Bush argued that ratification reflected the role that he envisaged for the United States as a leader amongst nations. In a letter submitted to Senator Clairborne Pell, Chair of the Senate Foreign Relations Committee, President Bush stated that "United States ratification of the Covenant on Civil and Political Rights at this moment of history would underscore our natural commitment to fostering democratic values through international law. 31 I.L.M. 645, 660 (May 1992).

contacts and experiences and its status as a well-recognized international human rights organization that plays a major role in litigation involving international human rights issues in this country's courts, will be useful to the Court in considering this case, and will provide an important international perspective.

(5)

Supreme Court, U.S.
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No. 03-633

IN THE

Supreme Court of the United States

DONALD P. ROPER, SUPERINTENDENT, POTOSI CORRECTIONAL CENTER,

Petitioner,

v.

CHRISTOPHER SIMMONS,

Respondent.

On Writ of Certiorari
To the Supreme Court of Missouri

BRIEF OF *AMICI CURIAE* JUSTICE FOR ALL ALLIANCE IN SUPPORT OF PETITIONER

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California v. Brown, 479 U.S. 538 (1987) 2,3,11,14,15,18,20,27
Clines v. State, 280 Ark. 77 (1983) 9
Deputy v. State, 500 A.2d 581 (Del. 1985) 9
Eddings v. Oklahoma, 455 U.S. 104 (1982)..... 3,9,14,15,21
Enmund v. Florida, 458 U.S. 782 (1982) 3,8,9,13,14,18,20,21
Fisher v. U.S, 328 U.S. 463 (1946) 14
Furman v. Georgia, 408 U.S. 238 (1972) 5,15,18,29
Godfrey v. Georgia, 446 U.S. 420 (1980) 8
Gregg v. Georgia, 428 U.S. 153 (1976)..... 6,7,15,29,30
Johnson v. Dulles, 509 U.S. 350 (1993) 1
Lockett v. Ohio, 438 U.S. 586 (1978) 3,7,14,15,18,20,21,22,27,30
M'Naghten's Case, 8 Eng. Rep. 718 (1843) 14
Penry v. Lynaugh, 492 U.S. 302 (1989) 14,28
People v. Davis, 95 Ill.2d 1 (1983) 10
People v. Serravo, 823 P.2d 128 (1992) 14
Ruffin v. State, 420 So.2d 591 (Florida 1982) 10
Selvage v. State, 680 S.W.2d 17 (1984) 10
Simmons v. Roper, 112 S.W.3d 397 (2003) 17,19

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Stanford v. Kentucky, 492 U.S. 361 (1989) 13,15,21,22,23,25,26

State v. Simmons, 944 S.W.2d 165 (1997) 4,16,17,18,19,20,29

Thompson v. Oklahoma, 487 U.S. 815 (1988) 10,11,12,13,22,24,25,26,27,28,29

Tison v. Arizona, 481 U.S. 137 (1987) 3,4,9,10,14,19,20

Trop v. Dulles, 356 U.S. 86 (1958) 5

Wilkins v. Missouri, 492 U.S. 361 (1989) 22,23

Williams v. Oklahoma, 358 U.S. 576 (1959) 6,15

Woodson v. North Carolina, 428 U.S. 280 (1976) 5,6,15,21,27,29

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Florida Statute Section 921.141 (5)(f)(1981) 8

Georgia Code Annotated Section 26-3102 (Supp.1975) 6

Georgia Code Annotated Section 27-2534.1 (b)(Supp. 1975) 6,7,15

Georgia Code Annotated Section 27-2534.1 (b)(7) (1978) 8

Georgia Code Annotated Section 27-2534.1 (c) (Supp. 1975) 6,15,16

Georgia Code Annotated Section 27-2537 (c)(Supp. 1975) 7

Model Penal Code Section 4.3 (1994) 14

North Carolina General Statute Section 14-17 (1969) 5

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Ohio Revenue Code Annotated Section 2929.04 (B)(1975) 7

LAW REVIEWS AND LAW JOURNALS AND TREATIES

Brim, Mitchel A. *The Ultimate Solution to Properly Administer the Ultimate Penalty*, Southwestern University Law Review, (2003) 2,5,14,15,16,24,25,28,30

Hoffman, Joseph L. *ON THE PERILS OF LINE-DRAWING: JUVENILES AND THE DEATH PENALTY*, Hastings Law Journal, (January 1989) 21

LaFave, Wayne R. *Criminal Law* 330 (3d.ed. 200) 14

OTHER AUTHORITIES

Bureau of National Affairs, Inc. The United States Law Week, *ORAL ARGUMENT: THE COURT WEIGHS EXECUTION OF MENTALLY RETARDED PRISONERS*, Washington D.C. 20037, Vol. 70, No.33 (March 5, 2002) 28

Hart, H. *Punishment and Responsibility*, 162 (1968) 18,20

Wilson, Mark *Convicted Sniper Lee Boyd Malvo Sentenced to Life*, USA Today, March 10, 2004, http: www.usatoday.com/news/nation/2004-03-10-malvo-x.htm 23

BRIEF JUSTICE FOR ALL ALLIANCE

STATEMENT OF *AMICI CURIAE* INTEREST [1]

Justice for All Alliance (JFAA) files this brief as *amici curiae* in support of Petitioner by written consent of all parties, pursuant to Rule 37.2 of the Rules of this Court.[2]

JFAA is an all volunteer not for profit organization founded in 1993. JFAA's purpose is to support victims of homicide and violent crimes through challenges that they must face on a regular basis, including victim's compensation, community outreach, trial procedures, parole and clemency hearings. JFAA provides emotional support to victims throughout the process. In addition, JFAA's mission is to act as an advocate for change in the criminal justice system to ensure that the rights of the victims and law-abiding citizens are protected.

This case involves important issues concerning the execution of juveniles that may affect the State of Texas. A decision upholding the Supreme Court of Missouri's ruling would prevent the State of Texas from bringing convicted murderers to justice by properly punishing them under Texas law. This Court has recognized that in punishing criminal offenders, the state plays a role in vindicating the rights of victims. *Johnson v. Dulles*, 509 U.S. 350, 366 (1993). JFAA has an interest in ensuring that the efforts of the State of Texas to vindicate those rights through the administration of its criminal laws are not unduly hampered. JFAA respectfully requests this Court adopt the clear objective criteria

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[1] No counsel for any party authored this brief in whole or in part, and no person or entity, other than the amici curiae and their members, made a monetary contribution to the preparation or submission of this brief. S. Ct. Rule 37.6.

[2] Letters of consent from both parties are on file with the Clerk of this Court.

defined by this Court evolving from state legislation over the past century as federal law and apply it to the instant case. Furthermore, to ensure that punishment is not disproportionate to the severity of the crime, the Court should focus on the moral culpability of the respondent at the time he committed premeditated murder and embrace the fundamental respect for humanity underlying the Eighth Amendment that requires the Court not group juveniles together as a class but rather acknowledge that they are all different with respect to their experience, maturity, intelligence and moral culpability.

SUMMARY OF ARGUMENT

The issue before the Court is whether the execution of a person who committed premeditated murder while under the age of eighteen constitutes "cruel and unusual punishment" in violation of the Eighth Amendment to the Constitution of the United States of America.

The Court is using the national standards of decency doctrine in a way that ignores what punishment society really deems acceptable and appropriate because it does not apply the criteria that is reflected through state legislation and defined by the Court as what factors dictate whether punishment is cruel and unusual. The time has come for the Court to adopt as federal law the clear objective criteria it has defined over the past century evolving out of state legislation to determine what punishment constitutes cruel and unusual under the Eighth Amendment.[3] The Court should require all states to apply the criteria on a case-by-case basis focusing on the moral culpability of the defendant.

The foundation of our judicial system is based on moral culpability.[4] In intentional torts and criminal law the judicial system requires a requisite mental state in order to convict

[3] Brim, Mitchel A., *The Ultimate Solution to Properly Administer the Ultimate Penalty*, 32 Sw. U. L. Rev. 275, 306 (2003).

[4] *California v. Brown*, 479 U.S. 538, 545 (1987).

one of a crime. In criminal law, specifically murder cases, punishment is imposed according to one's degree of mens rea.[5] In fact, one of the rationales for imposing the death penalty, deterrence, is directly linked to one's moral culpability because the threat of death prevents one from forming the intent to kill. The ultimate penalty is imposed on those who intend to kill, understand right from wrong and the consequences of their actions at the time of the act and nevertheless kill another human being. Juveniles are capable of understanding right from wrong and the consequences of their actions. Furthermore, they are capable of forming the requisite intent to kill to merit the death penalty. They are also capable of being deterred from forming the requisite intent as will be illustrated in the analysis of the instant case.

The Court and a majority of state legislatures have held that individual consideration is a constitutional requirement before sentencing one to death.[6] The Court needs to abide by this requirement and not group juveniles together as a class based on age. Rather, it should recognize that juvenile defendants, even those in the same age group, are shaped by individual life experiences and therefore possess different levels of maturity and make different choices. Consequently, their decisions affect their moral responsibility for a crime. This will be illustrated by looking at the similarities of Thompson, Wilkins, and Stanford and contrasting their moral culpability to that of Lee Malvo in the sniper case. What is reflected is that a fifteen, sixteen, and seventeen-year-old can

[5] Id.; *Tison v. Arizona*, 481 U.S. 137, 156 (1987) (holding that the legal system is based on the notion that the more purposeful the criminal conduct and serious the offense, the more severely it should be punished); *Eddings v. Oklahoma*, 455 U.S. 104, 116 (1982) (recognizing that the death penalty is appropriate in felony murder cases where the defendant intended to kill).

[6] *Enmund v. Florida*, 458 U.S. 782, 798 (1982) (quoting *Lockett v. Ohio*, 438 U.S. 586, 605 (1978).

be morally culpable to merit the death penalty. To ascertain the issue, a case-by-case analysis is required.

The Court should not focus solely on the states that expressly prohibit the execution of anyone under the age of 18 to decide if there is a national consensus. Rather, the Court should both consider and recognize that there is a national consensus among state legislatures to impose the death penalty on a defendant who did not intend to kill, nor killed, but was a major participant in a felony murder who knew that death was likely to occur.[7] Clearly, this indicates that society deems it acceptable to impose the death penalty on a seventeen-year-old that intended to kill and did in fact kill.

Executing the Respondent is not cruel and unusual punishment because he specifically knew it was wrong to kill, understood the consequences of his actions, and nevertheless committed a horrific premeditated murder of an innocent woman. His justification for the murder was that he knew his age would prevent him from receiving the ultimate punishment.[8] Juveniles like Simmons, need to be deterred from committing such an egregious act for the safety of society by being properly punished. The Respondent's execution furthers the goals of the death penalty because he deserves his life be taken as a result of him intentionally taking an innocent woman's life. Furthermore, it sends a message to other juveniles that when one understands the repercussions, knows right from wrong and still commits premeditated murder, he or she will receive the ultimate penalty.

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[7] *Tison v. Arizona*, 481 U.S. at 153-154 (holding that a defendant deserves the death penalty when he is a major participant in a felony murder and acts in a manner that reveals a reckless indifference to human life.).

[8] *State v. Simmons*, 944 S.W.2d 165, 169 (1997).

ARGUMENT

1. DEATH PENALTY JURISPRUDENCE DICTATES THIS COURT ADOPT THE OBJECTIVE CRITERIA THAT HAS EVOLVED OUT OF STATE LEGISLATION, APPLY IT TO THE INSTANT CASE, AND UNIVERSALLY ON A CASE-BY-CASE BASIS

This Court has defined what constitutes cruel and unusual punishment by relying on clear objective criteria that has evolved out of state legislation.

A. SENTENCING MUST BE ADMINISTERED IN A CONSISTENT AND RATIONAL MANNER

In 1972, this Court held that states may not give the sentencer unbridled discretion in deciding whether to impose the death penalty because the outcome may be based on prejudice and inflicted in an arbitrary and capricious manner.[9] In 1976, this Court invalidated a North Carolina mandatory death penalty statute because it failed to provide standards to guide the jury in its decision of whether first-degree murderers should live or die.[10] Furthermore, this Court found the statute unconstitutional because it did not allow the jury to consider relevant aspects of the convicted defendant's character, his criminal record, or the circumstances of the particular offense.[11] As a result of *Woodson*, the sentencer must now take into account the character, the record of the individual offender, and the circumstances of the particular offense before sentencing one to death.[12] Death sentences

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[9] *Furman v. Georgia*, 408 U.S. 238, 247 (1972).

[10] *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976); Brim, Mitchel A., *The Ultimate Solution to Properly Administer The Ultimate Penalty*, 32 Sw. U. L. Rev. 275, p.281-282. (2002); N.C.Gen.Stat. s 14-17 (1969)

[11] See *Woodson v. North Carolina*, 438 U.S. at 309.

[12] Id. The Court finds that the fundamental respect for humanity underlying the Eighth Amendment stated in *Trop v. Dulles*, 356 U.S. 86, 100

can no longer be imposed in an arbitrary and capricious manner.

B. GUIDELINES NEED TO BE IMPLEMENTED TO IMPOSE DEATH IN A CONSISTENT AND RATIONAL MANNER

The Court in *Gregg v. Georgia* found the concerns expressed in *Furman* are best met by providing the sentencer with standards to guide its use of information relevant to the imposition of death so that the death penalty could be imposed in a consistent and rational manner.[13] It recognized that giving jury guidance in its decision-making is essential and not a novel idea.[14] The Court found Georgia's capital sentencing procedures constitutional because it required the jury to consider any mitigating or aggravating circumstances that may be supported by the evidence.[15] To impose death, the jury also had to find beyond a reasonable doubt and specify one of the statutory aggravating circumstance(s).[16] Specifying the aggravating circumstance provided an additional safeguard to ensure that a death sentence was not imposed capriciously or arbitrarily.[17] The sentencer was allowed to weigh the aggravating and mitigating factors

(1958), requires consideration of the character and record of the individual offender and the circumstances of the particular offense.

13 428 U.S. 153, 189-194 (1976).

14 Id. at 192-193. (Court stated that it would be unthinkable for juries to follow any other course in a judicial system that relies on precedent and fixed rules of law).

15 Id. at 2921; Ga.Code Ann § 27-2534.1(b)(Supp.1975); See *Williams v. Oklahoma*, 358 U.S. 576, 585 (1959)(holding that the sentencing judge is authorized, if not required, to consider all of the mitigating and aggravating circumstances involved in the crime.).

16 See *Gregg v. Georgia*, 428 U.S. at 165; Ga. Code Ann s 26-3102 & s 27-2534.1 (c)(Supp.1975).

17 See *Gregg v. Georgia*, 428 U.S. at 195.

against each other.[18] In addition, to ensure that the sentence of death was appropriate in a particular case, there was a special provision that allowed a direct review by the Supreme Court of Georgia.[19]

C. SENTENCER MUST CONSIDER RELEVANT MITIGATING FACTORS

In 1978, this Court invalidated an Ohio statute because it did not permit the sentencer to consider the defendant's minor role in the offense, age, nor absence of intent to cause death as mitigating factors.[20] Justice Blackman concurred in the plurality decision because the Ohio statute did not require, in the case of a nontriggerman such as Lockett, the sentencing authority to consider the degree of defendant's participation in the acts leading to the killing and the defendant's lack of intent to kill.[21]

D. STATUTE INVALID BECAUSE ALLOWS ARBITRARY AND CAPRICIOUS IMPOSITION OF DEATH

18 Id. at 164; Ga.Code Ann. s 27-2534.1(b)(Supp.1975).

19 Id at 166-167 (the Court considered whether any errors were committed by way of appeal, whether the sentence of death was imposed under the influence of passion or any arbitrary factor and whether the sentence of death was disproportionate to the penalty imposed in similar cases); Ga.Code Ann s 27-2537(c)(Supp.1975).

20 *Lockett v. Ohio*, 438 U.S. 586, 607-608 (1978) (holding that once a defendant is convicted of aggravated murder with at least one of the seven specified aggravating circumstances, the death penalty must be imposed unless the sentencer finds at least one of the following mitigating circumstances: "1) The victim of the offense induced or facilitated it. 2) It is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation. 3) The offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity." Ohio Rev. Code Ann. § 2929.04 (B)(1975).

21 Id. at 616.

In 1980, this Court invalidated a Georgia statute that authorized a convicted murderer to be sentenced to death if the state proved, beyond a reasonable doubt, the offense was "outrageously or wantonly vile, horrible and inhuman."[22] The Court found the words "outrageously or wantonly vile, horrible and inhuman" too vague because it allowed the jury to impose the death penalty in an arbitrary and capricious manner.[23] This decision illustrates the Court's opinion that it is cruel and unusual punishment to sentence an individual to death without the sentence being based on clear objective standards that provide guidance so that a rational decision can be made regarding the imposition of death.[24]

E. IMPOSITION OF DEATH MUST BE LINKED TO MORAL CULPABILITY

In 1982, this Court held that the imposition of death must be linked to one's personal responsibility and moral guilt.[25] In a felony murder situation, the focus must be on the defendant's culpability, not on those who committed the robbery and shot the victim.[26] Under Florida law, Enmund could be put to death because he aided and abetted a robbery in the course of which a murder was committed.[27] Yet, Enmund did not intend to kill, attempt to kill, nor intend to facilitate a murder.[28] Rather, he was the driver of the getaway car in an armed robbery of a dwelling.[29] This Court reversed the

22 *Godfrey v. Georgia,* 446 U.S. 420, 422 (1980) (citing Ga. Code Ann §27-2534.1 (b)(7)(1978).

23 Id.

24 Id. at 428-432.

25 *Enmund v. Florida,* 458 U.S. 782, 797-800 (1982).

26 Id. at 798.

27 Id.; Fla. Stat. § 921.141(5)(f)(1981).

28 Id.

29 Id. at 784.

judgment of the Florida Supreme Court and held that putting Enmund to death for two killings he did not commit nor intend to commit did not contribute to one of the goals of the death penalty, retribution.[30]

F. SENTENCER MUST CONSIDER FAMILY HISTORY AND DEFENDANT'S ABUSE AS MITIGATING FACTORS

In 1982, this Court in *Eddings v. Oklahoma* held that a sentencer must be able to consider a defendant's unhappy upbringing, emotional problems and physical abuse as mitigating factors before imposing the death penalty.[31] The Court found that the trial judge only considered the defendant's youth and failed to take into consideration that as a child, the defendant was neglected and physically abused.[32]

G. CONSENSUS FOR IMPOSITION OF DEATH UPON A SHOWING OF RECKLESS INDIFFERENCE TO HUMAN LIFE

In 1987, this Court in *Tison v. Arizona* found a substantial and recent legislative trend among states to impose the death penalty on a defendant for the crime of felony murder absent a finding of intent to kill.[33] This finding was based on the consensus that substantial participation in a felony murder may justify the imposition of death absent a finding of intent to kill.[34] This Court found that a defendant deserved the

30 Id. at 801.

31 455 U.S. 104, 115-116 (1982) (reversing the Oklahoma Supreme Court's decision because the trial judge failed to consider all of the mitigating circumstances.)

32 Id. at 116.

33 481 U.S. at 153-154.

34 Id. at 154 citing *Clines v. State*, 280 Ark. 77, 84 (1983) (armed, forced entry, nighttime robbery of private dwelling known to be occupied plus evidence of killing contemplated; *Deputy v. State*, 500 A.2d 581,

death penalty where he was a major participant in the felony murder that implicitly revealed a reckless indifference to human life.[35] Even in the absence of finding a specific intent to kill, this Court held that Tison deserved the ultimate punishment because engaging in criminal activities known to carry a grave risk of death is a highly culpable mental state.[36]

H. NATIONAL CONSENSUS ANALYSIS ALLOWS THE COURT TO IGNORE PRECEDENT,THE RESPONDENT'S MORAL CULPABILITY, AND MAKE AN ARBITRARY DECISION BASED ON ASSUMPTIONS

The plurality in *Thompson v. Oklahoma* concluded that the execution of a person who was under sixteen at the time of his or her offense constitutes cruel and unusual punishment under the Eighth Amendment.[37] Instead of relying on clear objective standards so that the imposition of death can be

599-600. (Del.1985)(defendant present at scene; robbed victims; conflicting evidence as to participation in killing; cert. pending No 85-6272; *Ruffin v. State*, 420 So.2d 591, 594 (Fla. 1982) (defendant present, assisted co-defendant in kidnapping, raped victim, made no effort to intervene with co-defendant's killing and continued on the joint venture); *People v. Davis*, 95 Ill.2d 1, 52 (defendant present at the scene and had participated in other crimes with Holman, the triggerman, during which Holman had killed under similar circumstances), cert. denied, 464 U.S. 1001 (1983); *Selvage v. State*, 680 S.W.2d 17, 22 (Tex.Cr.App.1984) (participated in jewelry store robbery during the course of which a security guard was killed; no evidence that defendant himself shot the guard but he did fire a weapon at those who gave chase); see also *Allen v. State*, 253 Ga. 390, 395 (1984) (The result in *Enmund v. Florida* turns on how attenuated Enmund's responsibility was for the deaths of the victims in that case.) cert denied, 470 U.S. 1059 (1985).

35 See *Tison v. Arizona*, 481 U.S. at 158 (holding that reckless disregard for human life implicit in knowingly engaging in criminal activities known to carry a grave risk of death constitutes a highly culpable mental state.).

36 Id.

37 487 U.S. 815, 838 (1988).

made in a rational manner focusing on the particularized circumstances of the offense and the defendant, the Court made its decision based on the fact that eighteen states require the defendant to be at least sixteen at the time of the offense to merit the death penalty.[38] It failed to recognize that nineteen States authorized capital punishment without setting a minimum age limit and enabled some fifteen-year-olds to be prosecuted as adults.[39] According to Justice O'Connor, "these laws appear to render fifteen-year-olds death eligible, and thus pose a real obstacle to find a consensus."[40] The Court also relied on statistics regarding the behavior of juries that were not dispositive because they did not indicate how many times prosecutors had refrained from seeking the death penalty and how often juries had been asked to impose the death penalty on juveniles.[41] It is well known that punishment should be "directly related to the personal culpability of the criminal defendant."[42] Yet, the Court ignored the moral culpability of the petitioner because it based its decision on its conclusion that all juveniles are less culpable than adults and therefore do not merit the death penalty.[43] By grouping juveniles together as a class, the Court disregarded that the petitioner committed a brutal premeditated murder of his brother-in-law by shooting him twice, cutting his throat, chest and abdomen.[44] Thereafter,

38 Id. at 815.

39 Id. at 816.

40 Id.

41 Id. at 815-816.

42 See *California v. Brown*, 479 U.S. at 545 (O'Connor, J. concurring).

43 See *Thompson* v. Oklahoma, 487 U.S. at 816-817. Justice O'Connor, in her concurrence, noted that just because adolescents are generally less blameworthy than adults who commit similar crimes, that does not necessarily mean they are incapable of being morally culpable to merit the imposition of death.

44 Id. at 819.

the petitioner chained the body to a concrete block and threw it into a river.[45]

The Court in *Thompson v Oklahoma* wrongly assumed that because a teenager is less culpable than an adult, a teenager's execution has no retributive nor deterrence value.[46] This conclusion was not based on any evidence to support it. [47] Rather, the Court's conclusion was based partly on statistics that revealed that a majority of people arrested for willful homicide were over sixteen years of age at the time of the offense.[48] This fact has nothing to do with whether executing a fifteen-year-old furthers the goals of the death penalty. The Court also erroneously based its decision on its assumption that juveniles are incapable of being deterred from committing cold-blooded murder if they knew they would receive the ultimate penalty.[49] At age fifteen, one is quite capable of understanding right from wrong, the consequences of his or her actions, and rationalizing before he or she acts. Therefore, common sense dictates that fifteen-year-olds are capable of being deterred from committing first-degree murder if they know they would receive the ultimate punishment. The Court failed to consider society's moral outrage at petitioner's conduct, the atrociousness of the crime, his moral culpability and the emotions of the victim's family in its decision.

I. LANDMARK CASE DECIDED ARBITRARILY BECAUSE NO OBJECTIVE GUIDELINES EXIST FOR THE COURT TO RATIONALLY

[45] Id.

[46] Id. at 816.

[47] Id at 817.

[48] Id. at 816.

[49] Id. at 816-817. Justice O'Connor, however, acknowledges that not all fifteen-year-olds are incapable of being deterred from committing murder by the prospect of the death penalty.

DECIDE HOW MANY STATES FORM A NATIONAL CONSENSUS

One year after *Thompson*, this Court in *Stanford v. Kentucky* ruled that imposing the death penalty on sixteen and seventeen-year-olds did not constitute cruel and unusual punishment.[50] This conclusion was based on the Court having found that only fifteen states out of 37 decline to impose it on sixteen-year-olds and twelve on seventeen-year-olds.[51] There are no guidelines set forth in the Constitution or in the evolving standards of decency doctrine created by the United States Supreme Court that enable justices to ascertain how many states constitute a national consensus. This enabled the Court in *Stanford* to make its decision based on the justices own subjective conception of what constitutes a national consensus when precedent dictates they conduct a proportionality analysis examining "whether there is a disproportion between the punishment imposed and the defendant's blameworthiness, and whether a punishment makes any measurable contribution to acceptable goals of punishment."[52]

J. A PROPOSAL BASED ON PRECEDENT THAT RESPECTS HUMAN DIGNITY AND REFLECTS MODERN AMERICAN SOCIETY'S NOTION OF DECENCY

Instead of drawing a bright line rule based on the justices' subjective conception of how many states form a national consensus, death penalty jurisprudence evolving out of state legislation dictates this Court adopt the following objective

[50] 492 U.S. 361, 362 (1989).

[51] Id.

[52] Id. at 382. (O'Connor, J concurrence) citing *Thompson* v. *Oklahoma*, 487 U.S. at 853; quoting *Enmund v. Florida*, 458 U.S. at 825.

criteria as federal law.[53] First, the Court should consider whether the defendant knew right from wrong and understood the consequences of his or her actions at the time he or she committed the offense.[54] Second, the Court should determine whether the defendant intended to kill at the time he or she committed the offense or knew that there was a high probability that death would result.[55] Third, the Court should evaluate whether punishment is proportionate to the crime the defendant committed by looking at the nexus

[53] See *Lockett v. Ohio*, 438 U.S. at 602 (the States now deserve the clearest guidance that the Court can provide and that the Court has an obligation to reconcile previous differing views in order to provide that guidance).

[54] Brim, Mitchel A., *The Ultimate Solution to Properly Administer the Ultimate Penalty*, 32 Sw. U. L. Rev. 275 at 305; *M'Naghten's Case*, 8 Eng. Rep. 718-19 (1843) (holding that if the accused did not understand the consequences of his actions nor that it was wrong then he is excused from liability); Wayne R. LaFave, Criminal Law 330-331 (3d. ed. 200) (citing to Model Penal Code Section 4.3 (1994); *Penry v. Lynaugh*, 492 U.S. 302, 322 (1989); See *Enmund v. Florida*, 458 U.S. at 801; *People v. Serravo*, 823 P.2d 128, 136 (1992) (recognizing that under M'Naghten rule judges will hold a defendant liable if he knew that his act was morally wrong even if he did not know it violated a law); *Fisher v. United States*, 328 U.S. 463, 471 (1946); See *Eddings v. Oklahoma*, 455 U.S. at 115-118 (stating that the test for criminal responsibility in Oklahoma is knowing right from wrong).

[55] Brim, Mitchel A., *The Ultimate Solution to Properly Administer the Ultimate Penalty*, 32 Sw. U. L. Rev. 275 at 306; See *Lockett v. Ohio*, 438 U.S. at 608 (invalidating the Ohio capital sentencing statute because it precluded the sentencer from linking the ultimate penalty to one's moral culpability and authorized the imposition of death to someone who did not intend to kill.); See *California v. Brown*, 479 U.S. at 545 (Eighth Amendment's jurisprudence requires consideration of a defendant's character or record and the circumstances of the offense as a constitutionally indispensable part of the process of inflicting the penalty of death.); See *Enmund v. Florida*, 458 U.S. at 798 (requiring a link between the punishment and one's moral culpability); See *Tison v. Arizona*, 481 U.S. at 158 (holding that reckless disregard for human life implicit in knowingly engaging in criminal activities known to carry a grave risk of death constitutes a highly culpable mental state that merits the death penalty.).

between the punishment imposed and defendant's blameworthiness.[56] Further, the Court should inquire whether execution furthers the goals of the death penalty. Fourth, the Court should consider all relevant mitigating and aggravating circumstances.[57] In order to impose the death penalty, the Court must find that the aggravating circumstances outweigh the mitigating.[58] The Court should specify what aggravating or mitigating circumstances they are relying on to make its decision.[59] All of these four factors must be found to justify the defendant's execution.[60]

K. PROPOSED STANDARD APPLIED TO SIMMONS

[56] Brim, Mitchel A., *The Ultimate Solution to Properly Administer the Ultimate Penalty*, 32 Sw. U. L. Rev. 275 at 306; See *Stanford v. Kentucky*, 492 U.S. at 363; See *Furman v. Georgia*, 428 U.S. at 304; See *California v. Brown*, 479 U.S. at 541 quoting *Woodson v. North Carolina*, 428 U.S. at 304; See *Lockett v. Ohio*, 438 U.S. at 604 (holding that a sentencer must be permitted to consider any aspect of a defendant's character or record and any circumstances of the offense as a mitigating factor).

[57] See *Gregg v. Georgia*, 428 U.S. at 164 consistent with *Williams v . Oklahoma*, 358 U.S. 576, 585 (1959) (holding that the sentencing judge is authorized, if not required, to consider all of the mitigating and aggravating circumstances involved in the crime.); Ga.Code Ann. s 27-2534.1(b)(Supp.1975); See *Eddings v. Oklahoma*, 455 U.S. at 108-109 (holding that the sentencer should not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record, and any relevant circumstances offered by the defendant);

[58] Brim, Mitchel A., *The Ultimate Solution to Properly Administer the Ultimate Penalty*, 32 Sw. U. L. Rev. 275 at 306.

[59] See *Gregg v. Georgia*, 428 U.S. at 195 (requiring the sentencing authority to specify the factors it relied on to make its decision provides a safeguard to ensure death sentences are not imposed arbitrarily or capriciously.); Ga.Code Ann. s 27-2534.1(c)(Supp.1975).

[60] Brim, Mitchel A., *The Ultimate Solution to Properly Administer the Ultimate Penalty*, 32 Sw. U.L. Rev. 275 at 306.

In applying the proposed standard to the instant case, the Court should consider whether respondent intended to kill. Respondent's intent to kill is evidenced by his statements to his friends that he would "find someone to burglarize, tie the victim up, and ultimately push the victim off the bridge."[61] He planned to kill and in fact told his friends to meet him at a particular location at a particular time to commit murder.[62] Furthermore, respondent deliberated over killing Mrs. Crook when he burglarized her home, taped her hands behind her back, taped her eyes and mouth shut, placed her in the back of the minivan and drove her from her house in Jefferson County to Castlewood State Park in St. Louis County.[63] Respondent's actions - pulling her out of the van, restraining her hands and feet, covering her head with a towel, bounding her hands and feet together with electrical cable, hog-tie fashion, covering her face with electrical tape and then pushing her off the railroad trestle into the river - clearly reveal that he intended to kill her.[64]

The next factor the Court should consider is whether respondent understood the consequences of his actions at the time he committed murder. The respondent understood the consequences of his actions evidenced by the fact he denied any knowledge of the crime because he knew if he told the truth he would serve either jail time or receive the ultimate penalty.[65] His confession along with his statements to his friends showing his motive reveals that he knew and understood that robbing a woman and pushing her off the cliff would kill her.[66] In fact, his belief that his age would allow

61 See *State v. Simmons*, 944 S.W.2d at 169.

62 Id. at 178.

63 Id. at 170.

64 Id.

65 Id. at 173.

66 Id at 169.

him to "get away with it" shows a reckless indifference to human life and knowledge of the consequences of his actions.[67]

Third, the Court should consider whether execution is proportional to the crime the respondent committed. Here, respondent committed a premeditated murder of an innocent woman by taking her out of her home to a park and pushing her off of a cliff when she was terribly afraid of heights.[68] He intended to kill her and did so in a fashion disrespecting her humanity with no remorse.[69] Respondent's execution furthers the goals of the death penalty because it gives him his just dessert and sends a message to other juveniles that if you understand the consequences of your actions and still commit premeditated murder, you will suffer the ultimate price.

The Court should consider all relevant mitigating and aggravating factors. Here, the defense presented the following mitigating factors: respondent being seventeen and arguably unable to think about the future, vote or lawfully drink alcohol.[70] The prosecution presented respondent's age as an aggravating factor implying that he could only get worse.[71] The manner in which respondent killed Mrs. Crook along with his intent to kill are also aggravating factors. It seems that the aggravating circumstances outweigh the mitigating because of the atrociousness of the crime and respondent's moral culpability. Being seventeen years of age at the time of this murder did not prevent him from forming the requisite mental state to merit the death penalty. In fact,

67 Id.

68 Id. at 185.

69 Id. at 176-177.

70 *Simmons v. Roper*, 112 S.W.3d 397, 416 (2003).

71 Id.

his perceived justification for killing Mrs. Crook was that he was going to "get away with it."[72] If he knew that he would have received the ultimate punishment, he would have thought twice about committing murder and an innocent woman's life may have been saved. Punishment needs to be linked to respondent's moral culpability in a society that relies on the judicial system rather than self-help to vindicate their wrongs.[73] Otherwise, people will feel a sense of injustice and rely on vigilante justice or lynch law.[74]

2. PRECEDENT DICTATES THIS COURT BASE ITS DECISION ON RESPONDENT'S MORAL CULPABILITY

The foundation of our judicial system is based on moral culpability. This Court has consistently held that punishment must be directly linked to one's blameworthiness.[75] In fact, "causing harm intentionally must be punished more severely than causing the same harm unintentionally."[76] One of the rationales for imposing the death penalty, deterrence, is linked to moral culpability because it is based on the notion that a person will not form the requisite intent to kill because of the threat of death. In the instant case, respondent likely would not have committed murder if he knew that he would have received the ultimate penalty.

The respondent would like this Court to wrongfully assume that he cannot think about the future nor possess the requisite mental state to merit the ultimate penalty because of his age

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[72] See *State v. Simmons*, 944 S.W.2d at 169.

[73] See *Furman v. Georgia*, 428 U.S. at 308.

[74] Id.

[75] See *California v. Brown*, 479 U.S. at 545; See *Lockett v. Ohio*, 438 U.S. at 608 (invalidating the Ohio statute because it prevents the sentencer to consider the absence of intent to kill as a mitigating factor).

[76] See *Enmund v. Florida*, 458 U.S. at 798 citing H. Hart, *Punishment and Responsibility* 162 (1968).

and inability to vote or lawfully drink alcohol.[77] However, it is evident by respondent's actions, confession, and statement to his friend that he would "get away with it" that he did possess the requisite mental state to merit the death penalty and further was able to rationalize that he would escape the consequences of his actions.[78]

3. SOCIETY DEEMS RESPONDENT'S EXECUTION ACCEPTABLE EVIDENCED BY THE RECENT TREND OF IMPOSING THE DEATH PENALTY ON THOSE WHO MERELY APPRECIATE THE HIGH RISK OF DEATH AND DO NOT COMMIT THE ACT OF MURDER

This Court acknowledged in *Tison v. Arizona*, that a societal consensus exists to impose the death penalty on one who did not kill nor intend to kill but was merely a major participant in a felony murder.[79] The rationale for this decision was that actively participating in a felony murder shows a reckless disregard for human life; a highly culpable mental state meriting the death penalty.[80]

Intending to kill and following through with that intention is a higher culpable mental state than participating in an act that shows a reckless disregard for human life. Therefore, society deems it acceptable to execute a seventeen-year-old who committed an act of murder, intended to kill and rationalized that he would escape the ultimate punishment for his actions because of his age.[81]

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[77] See *Simmons v. Roper*, 112 S.W.3d 397 at 416.

[78] See *State v. Simmons*, 944 S.W.2d at 169-173.

[79] 481 U.S. at 138-144.

[80] Id.

[81] See *State v. Simmons*, 944 S.W.2d at 169-173.

This Court has consistently held that intentional harm must be punished more severely than unintentional harm.[82] In *Tison*, the petitioner did not specifically intend to kill the victims nor did he kill them.[83] In contrast, the respondent in the instant case had the specific intent to kill and did in fact kill the victim.[84] In *Tison*, the petitioner was executed.[85] Therefore, the respondent in the instant case should be executed.

The instant case exemplifies both the importance of the death penalty in society and the justification for its existence. In the instant case, the respondent was not deterred from committing murder because he knew his age would prevent him from receiving the ultimate punishment.[86] This implies that had respondent known he would have received the ultimate penalty he would not have committed the act of murder.

4. COURT SHOULD NOT DRAW A BRIGHT LINE RULE BASED ON AGE BECAUSE AGE IS NOT DETERMINATIVE OF ONE'S MORAL CULPABILITY

This Court is being asked to draw a bright line rule at an arbitrary age of eighteen. The Court should not draw a bright line rule at the arbitrary age of eighteen because age does not define one's character, judgment, maturity, personal respon-

82 See *Enmund v. Florida*, 458 U.S. at 798 citing H. Hart, *Punishment and Responsibility* 162 (1968); See *Lockett v Ohio*, 438 U.S. at 605; See *California v. Brown*, 479 U.S. at 545; See *Tison v. Arizona*, 481 U.S. at 156.

83 481 U.S. at 138. (O'Connor, J. concurring).

84 See *State v. Simmons*, 944 S.W.2d at 169.

85 481 U.S. at 158.

86 Id.

sibility or moral guilt.[87] In fact, drawing a bright line based on age "treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass."[88] Furthermore, it violates a fundamental principle underlying the Eighth Amendment. Respect for humanity requires "consideration of the character and record of the individual offender and the circumstances of the particular offense" before deciding whether one merits the ultimate penalty.[89]

5. THIS COURT HAS CONSISTENTLY HELD THAT INDIVIDUAL CONSIDERATION IS A CONSTITUTIONAL REQUIREMENT AND THEREFORE SHOULD ANALYZE JUVENILE EXECUTIONS ON A CASE-BY-CASE BASIS

This Court and a majority of state legislatures have held that individual consideration is a constitutional requirement before sentencing one to death.[90] This Court needs to abide by this precedent and not group juveniles together as a class but rather recognize that each juvenile defendant is different with respect to their maturity, intelligence, capabilities, life experiences, personal responsibility, and moral guilt. This Court should uphold Justice O'Conner's ruling in *Thompson* in which she stated "granting the premise that adolescents are generally less blameworthy than adults who commit similar crimes, it does not necessarily follow that all fifteen-year-olds are incapable of the moral culpability that would justify

87 Hoffman, Joseph L. *ON THE PERILS OF LINE-DRAWING: JUVENILES AND THE DEATH PENALTY*, Hastings Law Journal January, 1989, p. 258.

88 See *Woodson v. North Carolina*, 428 U.S. at 304.

89 Id.

90 See *Enmund v. Florida*, 458 U.S. at 792 (quoting *Lockett v. Ohio*, 438 U.S. at 605); See *Stanford v. Kentucky*, 492 U.S. at 362; See *Eddings v. Oklahoma*, 455 U.S. at 115-116.

the imposition of capital punishment."[91] Juveniles can form the requisite intent to kill, and are able to both understand the consequences of their actions and conform their conduct to civilized standards.[92] In fact, juveniles are mature enough to understand and know that murdering another person is wrong.[93]

Fifteen, sixteen, and seventeen-year-olds can possess the requisite mental state to merit the ultimate penalty. However, it is essential to look at the merits of each individual case as a constitutional requirement.[94] In *Thompson v. Oklahoma*, a fifteen-year-old brutally murdered his brother in law.[95] The petitioner shot his brother in law twice, cut his throat, chest, abdomen, and broke his leg.[96] Thereafter, he chained the body to a concrete block and threw it into a river where it remained for approximately four weeks.[97] In *Wilkins v. Missouri*, a sixteen-year-old planned to rob a store and "murder whoever was behind the counter because a dead person can't talk."[98] Wilkins carried out his plan by stabbing a victim a total of eight times.[99] The victim was stabbed once causing him to fall and then three times in the chest, and four more times in the neck after pleading for his life.[100]

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91 See *Thompson v. Oklahoma*, 487 U.S. at 817.

92 See *Stanford v. Kentucky*, 492 U.S. at 374.

93 Id.

94 See *Lockett v. Ohio*, 438 U.S. at 605; See *Stanford v. Kentucky*, 492 U.S. at 375.

95 487 U.S. at 819.

96 Id.

97 Id.

98 492 U.S. at 366.

99 Id.

100 Id.

Wilkins left the scene, leaving the victim to die on the floor.[101] In *Stanford v. Kentucky*, a seventeen-year-old repeatedly raped and sodomized a victim during and after the commission of a robbery at a gas station where the victim had worked.[102] The victim was driven to a secluded area where Stanford shot her in the face and in the back of her head.[103] Stanford knew the victim and killed her because he was afraid she would identify him.[104] In all of the three cases mentioned above, each petitioner knew what he was doing, each intended to kill, and each made the conscious decision to follow through with his intention, showing no remorse. Ultimately, each one possessed the requisite moral culpability to merit the death penalty irrespective of their age.

Not all seventeen-year-olds are alike. In contrast to *Stanford*, the Sniper case illustrates a seventeen-year-old who did not deserve the ultimate punishment because of his mental state and poor upbringing.[105] Lee Malvo was abandoned by his mother, and was in search for someone to provide guidance in his life.[106] The jurors believed that Lee Malvo was influenced and brainwashed by John Allen Muhammed to commit the various murders.[107] Therefore, he was found not to possess the moral culpability to merit the ultimate punishment because he was not fully responsible for his actions.

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101 Id.

102 Id at 365.

103 Id.

104 Id.

105 Mark Wilson, *Convicted Sniper Lee Boyd Malvo Sentenced to Life*, USA Today, March 10, 2004; http: www.usatoday.com/news/nation/2004-03-10_malvo_x.htm (last visited April 11, 2004).

106 Id.

107 Id.

6. THE COURT'S USE OF A NATIONAL CONSENSUS ANALYSIS IS INHERENTLY ARBITRARY, VIOLATES PRECEDENT, AND IGNORES THE FOUNDATION UPON WHICH THE JUDICIAL SYSTEM IS BASED

As a result of not relying on an objective standard to base its decision, this Court's use of a national consensus analysis to decide whether one deserves the ultimate punishment is inherently arbitrary for the following reasons. First, this Court is inconsistent in its analysis of whether a national consensus exists among juveniles and the mentally retarded. For example, in *Thompson*, this Court only considered the number of states that explicitly set a minimum age prohibiting a juvenile from execution because it assumed those are the only states that considered a minimum age for execution.[108] Yet, in *Atkins v. Virginia*, this Court found the absence of state legislation authorizing the execution of the mentally retarded to be "powerful evidence that today our society views mentally retarded offenders as categorically less culpable than the average criminal."[109] Furthermore, this Court considered the fourteen states that rejected capital punishment completely, in its analysis.[110]

Second, this Court must arbitrarily decide whether to include those states that prohibit capital punishment completely in its analysis. There is no objective guidance for this Court to rely on to make its decision. Nowhere in the Constitution does it state that the issue of what constitutes cruel and unusual punishment is dependent upon the Court's

[108] See *Thompson v. Oklahoma*, 487 U.S. at 815; Brim, Mitchel A., *The Ultimate Solution to Properly Administer the Ultimate Penalty*, 32 Sw. U. L. Rev. at 299.

[109] 536 U.S. 304, 315-316 (2002); Brim, Mitchel A., *The Ultimate Solution to Properly Administer the Ultimate Penalty*, 32 Sw. U. L. Rev. at 299.

[110] 536 U.S. at 314.

determination of whether to include those states that prohibit capital punishment completely in its analysis.

Third, this Court must arbitrarily decide how many states constitute a national consensus. There is no objective guidance for this Court to rely on to make its decision. Rather, it's the subjective determination of the justices that ultimately determines how many states form a national consensus. This contradicts the purposes behind the evolving standards of decency doctrine because the decision is not based on what society deems acceptable, but rather what the justices deem appropriate.[111]

Fourth, this Court contradicts itself by considering certain evidence in one landmark case and not in another. In *Thompson*, this Court considered respected professional organizations and beliefs of other nations such as Anglo-American heritage and Western European community in its analysis.[112] Yet, in *Stanford*, eleven years later, the Court did not consider such evidence.[113]

Fifth, this Court contradicts itself by interpreting the same evidence concerning the frequency of juvenile executions differently in two landmark decisions. In *Stanford*, this Court found the fact that "actual executions for crimes committed under age 18 accounted for only about two percent of the total number of executions that occurred between 1642 and 1986" to be insignificant.[114] Yet, eleven years earlier, this Court in *Thompson* found it significant that no execution of anyone under the age of sixteen had taken

[111] Brim, Mitchel A., *The Ultimate Solution to Properly Administer The Ultimate Penalty*, 32 Sw. U. L. Rev. at 303.

[112] 487 U.S. at 815.

[113] 492 U.S. at 370-380.

[114] Id. at 373-374.

place since 1948 despite the prosecution having tried thousands of murder cases.[115]

This Court not only interpreted statistics regarding the frequency of juvenile executions differently in two landmark cases but also interpreted what evidence is relevant to ascertain a juvenile's responsibility differently in *Thompson* and *Stanford*. For instance, in *Thompson*, this Court relied on a juvenile being less blameworthy than an adult because he or she is "less able to evaluate the consequences of his or her conduct while at the same time he or she is much more apt to be motivated by mere emotion or peer pressure than is an adult."[116] In fact, this Court in *Atkins* relied on the same evidence to conclude that it is unconstitutional to execute the mentally retarded.[117] Yet, in *Stanford* this Court disregarded petitioner's argument that seventeen and eighteen-year-olds cannot be held fully responsible for their actions.[118]

This Court contradicts itself by imposing its own judgment in one landmark case concerning capital punishment and not in another. For instance, in *Stanford*, this Court rejected the petitioner's argument that the issues in the case permit the Court to apply its "own informed judgment."[119] However, in *Atkins* this Court relied on its own independent evaluation in its analysis of whether executing the mentally retarded was constitutional.[120]

This Court ignores its own precedent with respect to what a sentencer must consider before deciding whether a juvenile

115 487 U.S. at 815-816.

116 Id. at 816.

117 536 U.S. at 320.

118 492 U.S. at 376.

119 Id. at 378.

120 536 U.S. at 321.

merits the ultimate penalty. In *Woodson*, this Court held that before a defendant can be sentenced to death, the sentencer must consider the "character and record of the individual offender and the circumstances of the particular offense."[121] However, the Court in *Thompson* failed to consider the individual character of the offender because it assumed all fifteen-year-olds are exactly the same with respect to their lesser culpability. Furthermore, this Court disregarded the atrociousness of petitioner's premeditated murder of his brother-in-law because it did not use the facts of the case as a basis for its determination.[122]

This Court has also ignored its own precedent with respect to linking punishment to one's moral culpability. It is well established that punishment should be directly linked to one's moral culpability.[123] In *Thompson*, the plurality gave the petitioner life imprisonment because it grouped juveniles under the age of fifteen together as a class and assumed that since they were less culpable than adults, they did not merit the ultimate penalty. This analysis enabled the Court to ignore the petitioner's moral culpability. The heinous acts of petitioner clearly reveal his culpable mental state. He shot his brother-in-law, Charles Keene, twice, cut his throat, chest and abdomen.[124] Subsequently, he chained Mr. Keene's body to a concrete block and threw it into the river.[125] In fact, the Medical Examiner of Oklahoma also found that Mr. Keene had been beaten which is consistent with testimony from a witness indicating petitioner kicked Mr. Keene in the

121 428 U.S. at 304.

122 487 U.S. at 815-817.

123 See *California v. Brown*, 479 U.S. at 545; See *Lockett v. Ohio*, 438 U.S. at 604;

124 See *Thompson v. Oklahoma*, 487 U.S. at 819.

125 Id.

head.[126] The petitioner cut Mr. Keene "so the fish could eat his body."[127] Yet, the plurality sentenced him to life imprisonment because he was arguably less culpable than an adult.[128] However, evidenced by his actions and statement, the petitioner possessed the moral culpability to merit the death penalty.

The evolving standards of decency doctrine underlying this Court's national consensus analysis, prevents the purpose for which it was enacted. The evolving standards of decency doctrine was created so this Court could interpret the Eighth Amendment in a flexible manner as to reflect what society deems acceptable.[129] However, this Court is drawing a bright line rule based on its subjective interpretation of how many states form a national consensus.[130] As Justice Scalia stated, "the country can't go back" once the Court makes its decision.[131]

CONCLUSION

This Court should not rely on a national consensus analysis because it violates stare decisis, ignores the foundation upon which the judicial system is based, and is inherently arbitrary. Relying on a national consensus analysis is arbitrary for the following reasons. First, there are no objective guidelines informing the justices whether to include the

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126 Id. at 860-861.

127 Id. at 861.

128 Id. at 816.

129 *Penry v. Lynaugh*, 492 U.S. 302, 330-331 (1989).

130 Brim, Mitchel A., *The Ultimate Solution to Properly Administer the Ultimate Penalty*, 32 Sw. U. L. Rev. at 303.

131 Id.; Bureau of National Affairs, Inc., The United States Law Week, ORAL ARGUMENT: THE COURT WEIGHS EXECUTION OF MENTALLY RETARDED PRISONERS, Washington D.C. 20037, Vol. 70, No. 33, p. 3544 (March 5, 2002).

twelve states that prohibit capital punishment in their analysis. Second, the justices must subjectively decide how many states form a national consensus because no objective guidelines exist. Third, the Court must arbitrarily decide what evidence to rely on in making its decision. Fourth, it allows the Court to base its decision on an erroneous assumption that all juveniles under the age of eighteen do not possess the requisite mental state to merit the death penalty. It does this by ignoring precedent that requires "consideration of the character and record of the individual offender and the circumstances of the particular offense" before deciding whether one merits the ultimate penalty.[132] Furthermore, precedent requires a proportionality analysis to ensure that the punishment is not disproportionate to the crime.[133]

Instead of grouping juveniles together as a class and drawing a bright line rule based on age, this Court should look at juveniles individually and respect them as human beings with unique characteristics, life experiences, personal responsibility and moral blameworthiness. Like in *Furman*, this Court is urged to commit error by concluding that anyone under the age of eighteen is incapable of possessing the requisite mental state to merit the death penalty.[134] This would be a grave injustice to not only the victim, the victim's family, but also to society as a whole because the Court would ignore respondent's moral culpability.[135]

An issue of this magnitude should not be based on whether the justices decide to include the 12 states that do not authorize capital punishment in their national consensus analysis.

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132 See *Woodson v. North Carolina*, 428 U.S. at 304.

133 See *Gregg v. Georgia*, 428 U.S. at 198; See *Thompson v. Oklahoma*, 492 U.S. at 363 (O'Connor, J concurrence).

134 408 U.S. at 386.

135 See *State v. Simmons*, 944 S.W.2d at 169.

Rather, it should be based on clear objective criteria, the proposed standard, which has evolved out of state legislation and can carefully and adequately aid sentencers to make a rational decision. This Court has consistently stated that it has an obligation to provide the states with the clearest guidance possible.[136] The time has come for the Court to fulfill its obligation by setting an example for the states and administering the ultimate penalty in a consistent and rational manner. The only way for this Court to achieve this is to adopt the proposed standard as federal law and apply it to the instant case. Furthermore, this Court should require the states that authorize capital punishment to apply it on a case-by-case basis focusing on the individual's moral culpability. It is unthinkable to follow any other course in a judicial system that relies on precedent and fixed rules of law.[137] By applying the proposed standard, the Court respects a person's pride and dignity whose life has been shattered as a result of one's selfish decision to kill.[138]

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[136] See *Lockett v. Ohio*, 438 U.S. at 602.

[137] See *Gregg v. Georgia*, 428 U.S. at 193.

[138] Brim, Mitchel A., *The Ultimate Solution to Properly Administer the Ultimate Penalty*, 32 Sw. U. L. Rev. at 316.

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No. 03-633

IN THE SUPREME COURT OF THE UNITED STATES

DONALD ROPER, Superintendent, Potosi Correctional Center,
Petitioner

v.

CHRISTOPHER SIMMONS,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

Brief of Juvenile Law Center, Children and Family Justice Center, Center on Children and Families, Child Welfare League of America, Children's Defense Fund, Children's Law Center of Los Angeles, National Association of Counsel for Children, and 45 other organizations, as *AMICI CURIAE* In Support of Respondent

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UNITED STATES SUPREME COURT CASES

Ashcroft v. American Civil Liberties Union, 124 S. Ct. 2783 (2004).....17

Atkins v. Virginia, 536 U.S. 304 (2002).....2, 4, 12, 19, 25, 27

Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie County v. Earls, 536 U.S. 822 (2002).....15

Bellotti v. Baird, 443 U.S. 622 (1979).....16

Frazier v. Cupp, 394 U.S. 731 (1969) 27

Gallegos v. Colorado, 370 U.S. 49 (1962) 14

In re Gault, 387 U.S. 1 (1967) 14, 15

Ginsburg v. New York, 390 U.S. 629 (1968) 17

Goss v. Lopez, 419 U.S. 565 (1975).....5

Haley v. Ohio, 332 U.S. 596 (1948) 13, 14

Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988) 17

Hodgson v. Minnesota, 497 U.S. 417 (1990) 11, 12, 16, 17

Kaupp v. Texas, 538 U.S. 626 (2003) 14, 15

Lee v. Weisman, 505 U.S. 577 (1992) 17, 18

Marsh v. Chambers, 463 U.S. 783 (1983).....18

May v. Anderson, 345 U.S. 528 (1953) 13

McKeiver v Pennsylvania, 403 U.S. 528 (1971).....15

Miranda v. Arizona, 384 U.S. 436 (1966) 27

New Jersey v.T.L.O., 469 U.S. 325 (1985) 16

Parham v. J.R., 442 U.S. 584 (1979) 16

Penry v. Lynaugh, 492 U.S. 302 (1989) 2

Prince v. Massachusetts, 321 U.S. 158 (1944).....17

Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000) 18

Schall v. Martin, 467 U.S. 253 (1984) 15, 16, 17

Stanford v. Kentucky, 492 U.S. 361 (1989) 2, 4, 6, 12

Thompson v. Oklahoma, 487 U.S. 815 (1988) 4, 5, 6, 11, 18

Vernonia Sch. Dist. v. Acton, 515 U.S. 646 (1995) 15, 16, 17

Yarborough v. Alvarado, 124 S. Ct. 2140 (2004) 14, 15

OTHER FEDERAL CASES

Hutchins v. District of Columbia, 188 F.3d 531 (D.C. Cir. 1999)...17

Qutb v. Strauss, 11 F.3d 488 (5th Cir. 1993) 17

Schleifer v. City of Charlottesville, 159 F.3d 843 (4th Cir. 1998).17

Taylor v. Maddox, 366 F.3d 992 (9th Cir. 2004) 26

FEDERAL STATUTES

10 U.S.C.A. § 505.....8

50 App. U.S.C.A. § 454.....8

Department of Defense Appropriations Act, 1999, Pub. L. No. 105-262, § 8128, 112 Stat. 2279 (1998) 8

STATE CONSTITUTIONAL PROVISIONS

Ala. Const. amends. 386, 387.....9

Arizona, Ariz. Const., art. 4, part 2 § 2221 21

STATE STATUTES

Ala. Code § 12-16-60 7

Ala. Code § 26-1-1 5

Ala. Code § 5-19A.....10

Ala. Code § 11-65-44 9

Ala. Code § 13A-12-200.5 8

Ala. Code § 13A-12-3 ..... .10

Ala. Code § 26-1-1 5

Ala. Code § 28-11-13 ..... .10

Alaska Stat. 05.15.180.....9

Alaska Stat. 11.76.100, .105 10

Ariz. Rev. Stat. Ann. 5-512, -115 9

Ark. Code Ann. § 27-16-604 6

Cal. Welf. & Inst. Code § 607.....20

Colo. Rev. Stat. § 42-2-104 6

Colo. Rev. Stat. Ann. § 18-13-121 7

Conn. Gen. Stat. § 46b-133c..... 19

D.C. Code Ann. § 50-1401.01 10

Idaho Code 15-2-501 9

Illinois, 720 Ill. Comp. Stat. 5/12-10 10

Ind. Code 29-1-5-1 9

Ind. Code § 31-30-1-4..... 21

Iowa Code Ann. §§ 633.264, .3 9

Iowa Code Ann. §§ 99D.1, 99G.30 9

Kan. Stat. Ann. § 38-101 9

Kan. Stat. Ann. § 38-1636 19

Kan. Stat. Ann. § 59-601 9

La. Rev. Stat. Ann. § 32:405.1 6

La. Rev. Stat. Ann. 47:9025 9

Mass. Gen. Laws ch. 119 § 74 21

Miss. Code Ann. § 1-3-27 5

Miss. Code Ann. § 13-5-1 7

Miss. Code Ann. § 63-1-9 ..... 6, 7

Miss. Code Ann. § 75-76-155 9

Mo. Ann. Stat. § 474.310 9

Mo. Ann. Stat. § 494.425..... 7

Neb. Rev. Stat. 2-1207 9

Neb. Rev. Stat. 25-1601 7

Neb. Rev. Stat. § 43-2101 5

Nev. Rev. Stat. 463.350 9

N.H. Rev. Stat. Ann. § 551:1 9

N.J. Stat. Ann. § 39:3-10 7

N.M. Stat. Ann. § 32A-2-20 20

N.C. Gen. Stat. § 14-313 7

Or. Rev. Stat. § 112.225 9

18 Pa. Cons. Stat. Ann.§ 6305 7

1 Pa. Cons. Stat. Ann. § 1991 5

S.C. Code Ann. §§ 62-2-501, 62-1-201 9

Tex. Prob. Code Ann. 57 9

Tex. Rev. Civ. Stat. Ann. art. 179e 9

Utah Code Ann. 76-10-104, -105 10

Va. Code Ann. § 18.2-371.2 7

Va. Code Ann. § 46.2-334.01 10

Va. Code Ann. § 64.1-47 9

Wash. Rev. Code Ann. § 67.16.350 9

ACADEMIC JOURNALS AND BOOK CHAPTERS

Lara. A. Bazelon, *Exploding the Superpredator Myth: Why Infancy is the Preadolescent's Best Defense in Juvenile Court*, 75 N.Y.U. L. REV. 159 (2000) 20, 21

A. Bechara, D. Tranel, and H. Damasio, *Characterization of the decision-making deficit of patients with ventromedial prefrontal cortex lesions*, 123 BRAIN 2189-2202 (2000)...29

Thomas J. Berndt, *Developmental Changes in Conformity to Peers and Parents*, 15 DEVELOPMENTAL PSYCHOL. 608 (1979) 24

Philip J. Cook & John H. Laub, *After the Epidemic: Recent Trends in Youth Violence in the United States*, 29 CRIME & JUST. 1 (2002) 20

M. DeBellis & D. Keshavan, *Sex differences in brain maturation in maltreatment related pediatric posttraumatic stress disorder*, 27 NEUROSCIENCE AND BEHAVIORAL REVIEWS 103 (2003) 29

Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891 (2004) 26, 27

Barry C. Feld, *Competence, Culpability, and Punishment: Implications of Atkins for Executing and Sentencing Adolescents*, 32 HOFSTRA L. REV. 463 (Spring 2004, in press) 25, 26

Martin L. Forst & Martha-Elin Blomquist, *Cracking Down on Juveniles: The Changing Ideology of Youth Corrections*, 5 Notre Dame L. J. Ethics & Pub. Pol'y 323 (1991 20

Thomas Grisso and Laurence Steinberg et al., *Juveniles' Competence to Stand Trial: A Comparison of Adolescents and Adults' Capacities as Trial Defendants*, 27 LAW & HUM. BEHAV. 333 (2003) 26

Thomas Grisso, *Juveniles' Capacities to Waive Miranda Warnings: An Empirical Analysis*, 68 CAL. L. REV. 1134-1166 (1980) 25

Carl Keane et al., *Deterrence and Amplification of Juvenile Delinquency by Police Contact: The Importance of Gender and Risk-Orientation*, 29 BRIT. J. CRIMINOLOGY 336 (1989).....23

Dorothy Otnow Lewis *et al.*, *Neuropsychiatric, Psychoeducational, and Family Characteristics of 14 Juveniles Condemned to Death in the United States*, 145 AM. J. PSYCHIATRY 584 (1988) 28, 29

Deidre E. Norton, *Why Criminalize Children? Looking Beyond the Express Policies Driving Juvenile Curfew Legislation*, 4 N.Y.U. J. LEGIS. & PUB. POL'Y 175 (2000-2001).....8, 9

Richard S. Ofshe and Richard A. Leo, *The Decision to Confess Falsely, Rational Choice and Irrational Action*, 74 DENV. U. L. REV. 979 (1997) 26

Allison D. Redlich & Gail S. Goodman, *Taking Responsibility for an Act Not Committed: The Influence of Age and Suggestibility*, 27 LAW & HUM. BEHAV. 141 (April 2003) 27

Gerald Robin, *Juvenile Interrogation and Confessions*, 10 J. POL. SCI. & ADMIN. 224,(1982) 25, 26

William Ruefle & Kenneth Mike Reynolds, *Curfews and Delinquency in Major American Cities*, 41 CRIME & DELINQ. 347 (1995) 9

Elizabeth S. Scott et al., *Evaluating Adolescent Decision Making in Legal Contexts*, 19 LAW & HUM. BEHAV. 221 (1995) 24

Christopher Slobogin *et al.*, *A Prevention Model of Juvenile Justice: The Promise of Kansas v. Hendricks for Children*, 1999 WIS. L. REV. 185 (1999)..... 23, 25

Mark C. Stafford & Mark Warr, *A Reconceptualization of General and Specific Deterrence*, 30 J. RES. CRIME & DELINQ. 123 (1993) 25

Laurence Steinberg & Elizabeth Cauffman, *Maturity of Judgment in Adolescence: Psychosocial Factors in Adolescent Decision Making*, 20 LAW & HUM. BEHAV. 249, (1996) 23

David S. Tanenhaus & Steven A. Drizin, *"Owing to the Extreme Youth of the Accused": The Changing Legal Response to Juvenile Homicide*, 92 J. CRIM. L. & CRIMINOLOGY 641 (2002) 20

Franklin E. Zimring, *Kids, Groups and Crime: Some Implications of a Well-Known Secret*, 72 J. CRIM. L. & CRIMINOLOGY 867 (1981) 24

Franklin E. Zimring, *The Punitive Necessity of Waiver in* THE CHANGING BORDERS OF JUVENILE JUSTICE: TRANSFER OF ADOLESCENTS TO THE CRIMINAL COURT 214 (Jeffrey Fagan and Franklin E. Zimring, eds.) (2000) 22

BOOKS

William J. Bennett, John J. Dilulio, Jr., & John P. Walters, BODY COUNT: MORAL POVERTY – AND HOW TO WIN AMERICA'S WAR AGAINST CRIME AND DRUGS 27 (1996) 20

Gisli H. Gudjonsson, THE PSYCHOLOGY OF INTERROGATIONS AND CONFESSIONS: A HANDBOOK (2003) 26

Herbert Packer, LIMITS OF THE CRIMINAL SANCTION 39-40 (1968) 22

Franklin E. Zimring, AMERICAN YOUTH VIOLENCE 13-14 (1998) 19, 20, 21

ADDITIONAL RESOURCES

Chris Mallett, *Socio-Historical Analysis of Juvenile Offenders on Death Row*, 39 Criminal Law Bulletin, No. 4, 445 (July-August 2003) 28

David Firestone, *Arkansas Tempers a Law on Violence by Children*, N.Y. Times, April 11, 1999, at A20 21

Patrick Griffin, National Center for Juvenile Justice and U.S. Department of Justice, *Trying and Sentencing Juveniles as Adults: An Analysis of State Transfer and Blended Sentencing Laws* 12 (October 2003) 19

2 Myron Moskovitz & Jane Grill, CRIMINAL LAW DEFENSES § 175(a) (Supp. 1999) 21

John Reid & Associates, False Confession—*The Issues,* Monthly Investigator's Tips (April 2004) 28

U.S. Conference of Mayors, *A Status Report on Youth Curfews in America's Cities: A 347-City Survey* 1 (1997) (www.usmayors.org/uscm/news/publications/curfew.htm. 8

U.S. Department of Justice, Office of Juvenile Justice and Delinquency Prevention, Juvenile Justice Bulletin: *Challenging the Myths* (February 2000) 21

Youth Violence: A Report of the Surgeon General (2001) 20

INTEREST OF *AMICI*[1]

The organizations submitting this brief work with, and on behalf of, adolescents in a variety of settings, from day care to foster care, substance abuse to homelessness, and at every stage of the juvenile and criminal justice process. *Amici* are advocates and researchers who bring a unique perspective and a wealth of experience in providing for the care, treatment, and rehabilitation of youth in the child welfare and juvenile justice systems. *Amici* know from first hand experience that youth who enter these systems need extra protection and special care, clearly necessitated by their status as youth. *Amici* also know from their collective experience that adolescent immaturity often manifests itself in numerous ways that implicate culpability, including diminished ability to assess risks, make good decisions, and control impulses. It is precisely for these reasons that *Amici* believe that the status of childhood and adolescence separates youth from adults in categorical and distinct ways and that, while youth should be held accountable, with respect to capital punishment, youth cannot be held to the same standards of blameworthiness and culpability as their adult counterparts.

IDENTITY OF *AMICI*

See Appendix "A" for a list and brief description of all *Amici*.

STATEMENT OF FACTS

Amici adopt the statement of facts as articulated in the brief of Respondent Christopher Simmons.

[1] *Amici* file this brief with the consent of all parties. Letters of consent have been lodged with the Clerk of Court. No counsel for a party authored this brief in whole or in part. No person or entity, other than *Amici*, their members, or their counsel made a monetary contribution for the preparation or submission of this brief.

SUMMARY OF ARGUMENT

In *Atkins v. Virginia*, 536 U.S. 304 (2002), this Court ruled that subjecting mentally retarded individuals to the death penalty constitutes cruel and unusual punishment in violation of the Eighth Amendment. Citing developments in the law and social science that reflected a new national consensus regarding execution of the mentally retarded, the Court overruled its decision in *Penry v. Lynaugh*, 492 U.S. 302 (1989), that had upheld application of the death penalty to this group of individuals. A similar challenge confronts the Court in this case, with respect to the execution of youth who commit their crimes at age 16 or 17. The Court ruled in *Stanford v. Kentucky*, 492 U.S. 361 (1989) that such executions did not violate the Eighth Amendment. But legislative developments and an emerging powerful body of empirical research over the past fifteen years have eroded the foundation of *Stanford* and compel the conclusion that, under evolving standards of decency, the execution of such persons amounts to cruel and unusual punishment. In particular, such executions no longer serve the accepted purposes of capital punishment, retribution, and deterrence.

In addition to the clear legislative trend eliminating capital punishment for 16 and 17 year olds altogether and the reluctance of juries to sentence youth[2] to death (which are documented in the Respondent's brief and were central to *Atkins*), the well-entrenched practice in this country of circumscribing the rights and responsibilities of youth in all walks of life – from service in the armed forces and voting, to obtaining a driver's or marriage license – has been further extended since *Stanford*. State legislatures have passed new laws to limit minor's participation in activities freely open to adults, and this Court has broadened its own jurisprudence accommodating long-held views about the differences between youth and adults under the law. Premised on the diminished judgment of youth, these legal developments evidence a national determination that 16 and 17 year olds should be considered less culpable for their criminal acts than adults – a determination that undermines the retributive purpose of capital punishment.

Moreover, as in *Atkins*, the legislative trend to eliminate the

[2] In this brief, *Amici* use the terms youth, minor, adolescent, and juvenile interchangeably to refer to those individuals under the age of 18, unless otherwise specified.

death penalty since *Stanford* is all the more compelling in light of the passage of anti-crime legislation targeting youth in almost every state during this same time period. *Amici* argue that the legislative trend with respect to the juvenile death penalty is even more persuasive, given the unmatched phenomenon involving youth – the now-discredited "super-predator" myth, intended to demonize today's youthful offenders as qualitatively different than earlier offenders -- which fueled this wave of transfer laws. Importantly, however, these statutes were primarily offense-, rather than offender-based, reflecting a legislative response to increased fears about public safety and frustration with the limited jurisdiction of the juvenile court. In the absence of any simultaneous attempts in the states to lower the age for juvenile court jurisdiction, there is no evidence that these transfer laws reflect new legislative views about the maturity or culpability of these youthful offenders, for the purposes of Eighth Amendment analysis.

These legal trends also have been complemented by an emerging body of social science research attesting to developmental differences between adolescents and adults that undermines the deterrent rationale of capital punishment. This path-breaking scholarship shows that 16 and 17 year olds are more likely than adults to engage in risky behavior; are more likely to consider only the immediate effects of their acts rather than the long-term consequences; and are far more susceptible to being overcome by peer pressure than adults, both in terms of how they evaluate their own behavior and in conforming their conduct to what peers are doing. And it shows that because they live in the moment, 16 and 17 year olds feel that they have less of a stake in the future. All told, this recent research confirms that 16 and 17 year olds as a class are less capable of controlling their impulses than adults, and thus are less likely than adults to be deterred from committing capital crimes by the prospect of execution.

On a separate but equally important front, social science research has recently demonstrated the special vulnerability of 16 and 17 year olds to confess to crimes that they did not commit. This research mirrors studies showing that the particular deficits of the mentally retarded make them likewise prone to giving false confessions – studies that informed the Court's decision in *Atkins*. The same potential for wrongful executions of adolescents compels their exclusion from eligibility for the death penalty.

ARGUMENT

The Eighth Amendment's prohibition on cruel and unusual punishment forbids the imposition of penalties that are disproportionate to the offense. *Atkins*, 536 U.S. at 311. A penalty is constitutionally disproportionate if it is out of step with contemporary societal values, "the clearest and most reliable objective evidence [of which] is the legislation enacted by the country's legislatures." *Id.* at 312 (internal quotations omitted). As set forth in the Respondent's brief, the years since *Stanford* have seen a marked trend in the nation's legislatures toward a categorical ban on the application of the death penalty to persons who were 16 or 17 years old at the time of their offense. Death penalty legislation is not, however, the only set of laws relevant to assessing whether executing such persons is constitutionally disproportionate. In *Stanford*, a majority of the Court determined that this assessment should also be informed by the widespread pattern of statutes nationwide that curtail the rights and responsibilities of youth in countless facets of daily life. *Stanford*, 492 U.S. at 382 (O'Connor, J., concurring); *id.* at 394-96 (Brennan, Marshall, Blackmun, and Stevens, JJ., dissenting). *See also Thompson v. Oklahoma*, 487 U.S. 815, 854 (1988) (O'Connor, J., concurring) ("The special qualitative characteristics of juveniles that justify legislatures in treating them differently from adults for many other purposes are also relevant to the Eighth Amendment proportionality analysis."). Since *Stanford*, numerous laws have been passed to prohibit or limit 16 and 17 year olds from engaging in a wide range of constitutionally protected and other activities freely engaged in by persons 18 and older.

In addition to examining objective evidence of contemporary values, as reflected in the enactments of legislatures, this Court has said that it must bring its own reasoned judgment to bear on whether a particular form of punishment is constitutionally disproportionate. *Atkins*, 536 U.S. at 313. In exercising that judgment in *Atkins*, the Court turned to social science research and concluded that the evidence showed that the retributive and deterrent purposes of capital punishment would not be served by executing mentally retarded individuals. *Id.* at 318-21. The same is true with respect to adolescents. Landmark social science research now reveals that 16 and 17 year olds are less capable of controlling

their behavior than adults and may be more likely than adults to confess to crimes that they did not commit -- empirical evidence that greatly diminishes the supposed retributive and deterrent purposes of executing 16 and 17 year olds.

I. LEGAL RESTRICTIONS ON THE RIGHTS AND RESPONSIBILITIES OF YOUTH DEMONSTRATE THAT THE EXECUTION OF MINORS UNDER THE AGE OF EIGHTEEN AT THE TIME OF THE OFFENSE FAILS TO SERVE ANY RETRIBUTIVE PURPOSE UNDER THE EIGHTH AMENDMENT

A. Since *Stanford*, Increased Legislative Restrictions on Youth's Participation in Activities Open to Adults Evidence a Consensus about the Incapacities and Impairments of Youth That Make Them Less Culpable for the Purposes of Eighth Amendment Proportionality Analysis

The American legal tradition has consistently acknowledged that "there *are* differences which must be accommodated in determining the rights and duties of children as compared with those of adults." *Goss v. Lopez*, 419 U.S. 565, 590-91 (1975) (Powell, J. dissenting) (emphasis in original). To that end, federal and state legislatures have long "accommodated" these differences through laws distinguishing adolescents from adults by limiting the "rights and duties" of adolescents. These laws reflect basic assumptions that our society makes "about children as a class; we assume that they do not yet act as adults do, and thus we act in their interest by restricting certain choices that we feel they are not yet ready to make with full benefit of the costs and benefits attending such decisions." *Thompson*, 487 U.S. at 825 n.23. Notably, for most civil purposes, no state sets the age of majority below 18, and Alabama, Nebraska, Mississippi, and Pennsylvania set it at age 19 or older.[3] This is a powerful reminder that, as a nation, we treat 16 and 17 year olds differently than we treat 18

[3] Alabama, ALA. CODE § 26-1-1 (age 19); Mississippi, MISS. CODE. ANN. § 1-3-27 (age 21); Nebraska, NEB. REV. STAT. § 43-2101 (age 19); Pennsylvania, 1 PA. CONS. STAT. ANN. § 1991 (age 21).

year olds, in virtually all respects – from the exercise of fundamental constitutional rights such as voting and reproductive choice, to participation in more mundane activities, such as smoking cigarettes, drinking alcohol, driving a car, and even patronizing a tanning salon or tattoo parlor.

In *Stanford* and *Thompson*, a majority of the Court held that state laws distinguishing youth from adults in realms outside of the death penalty *are* relevant to determining whether the death penalty is excessive or disproportionate when applied to juveniles. *Stanford*, 492 U.S. at 382 (O'Connor, J., concurring in judgment); *id.* at 394-95 (Brennan, Marshall, Blackmun and Stevens, JJ., dissenting); *Thompson*, 487 U.S. at 823-25 (1988) (plurality opinion); *id.* at 854 (O'Connor, J., concurring in judgment).

Since *Stanford*, it appears that no legislature has eased age-based statutes imposing restrictions on adolescents. In fact, many states have either adopted new restrictions on adolescent activities (that present new risks to vulnerable youth) or increased existing limitations. For example, the recent growth in tanning salons and body piercing outlets, and the increased popularity of tattoos to adolescents have all led to new or amended legislation imposing age-based limits on access to these activities and services.[4] Similarly, a substantial number of states have imposed new restrictions on minors' driving or their eligibility for drivers' licenses.[5] Finally, many states have amended their tobacco

[4] Of the 33 states with laws regulating minors' ability to obtain body piercing services, at least 30 states passed their laws since 1989, with at least 19 states passing those laws within the past five years (1999-2004). *See* Appendix B. Of the 42 states that have age-based tattoo laws, at least 24 states passed their age-based tattoo restrictions since 1989, with at least seven states passing age-based tattoo restrictions in the past five years (1999-2004). *See* Appendix B. Of the 16 states that prohibit youth under age of 18 from tanning without parental consent, 15 states passed their tanning legislation since *Stanford* was argued. *See* Appendix B. At least two additional states (California and Pennsylvania) have proposed age-based tanning legislation this year. California, A.B. 2193, 2004 Leg., Reg. Sess. (Ca. 2004) (would prohibit youth under age 18 from tanning except on prescription by a physician); Pennsylvania, H.B. 109, 2004 Leg., Reg. Sess. (Pa. 2004) (would add requirement that youth under age 18 obtain parental consent for tanning).

[5] *See, e.g.*, Arkansas, ARK. CODE. ANN. § 27-16-604, effective July 1, 2002 (increased license age from 16 to 18); Colorado, COLO. REV. STAT. § 42-2-104, effective July 1, 1999 (increased requirements for driver's license and restricted hours youth under 18 may drive); Louisiana, LA. REV. STAT. ANN. § 32:405.1, effective July 1, 1993 (increased license age from 15 to 16); Mississippi, MISS. .

legislation, either raising the age requirement for purchase, adding or increasing penalties for minors who possess or purchase tobacco, adding or increasing penalties for retailers who sell tobacco to minors, or limiting the availability of tobacco vending machines.[6] Areas of legislation not before the Court in *Stanford* but before the Court today include state age-based restrictions on abortion, body piercing, tobacco, firearms, employment hours, pawning property, artificial tanning, tattoos, and wills. In addition, before the Court today are areas of age-based legislation that states have made more stringent since *Stanford*, such as states' drivers' licensing requirements for youth under age 18. *See State Age Requirements for Various Activities, posted on Juvenile Law Center's website at www.jlc.org/agerequirements. (For the Court's reference, the website listing is reproduced at Appendix B.)*

Rights and Responsibilities of Citizenship:

- Jury Duty: In all 50 states and the District of Columbia no one under the age of 18 can serve on a jury.[7] Two jurisdictions require jurors to be 19; two others require jurors to be 21.
- Military service: Federal law does not allow youth under the age of 18 to enlist in the Regular Army, Regular Marine Corps, or Regular Coast Guard without written parental consent.[8] Youth under eighteen may not be drafted.[9]
- Voting: The twenty-sixth amendment to the Constitution sets eighteen as the age at which citizens may vote; all state legislatures have followed suit for state and local elections.

Constitutionally protected activities:

- Abortion/reproductive rights: In 39 states, an unemancipated minor under age 18 needs either parental consent or judicial permission to obtain an abortion.
- Marriage In 36 states and the District of Columbia, youth under age 18 may not marry without parental consent.
- Access to pornography: 47 states either absolutely prohibit the sale or delivery of material that is obscene or harmful to minors to youth under the age of 18, or only allow sale or delivery if a youth's parent consents. Alabama prohibits the delivery of material harmful to minors to youth under the age of 19.[10]
- Curfew: Four out of five U.S. cities with a population of more than 30,000 were found in 1995 to have a nighttime youth curfew. The most common upper age limit is 18.[11]

CODE ANN. § 63-1-9, effective September 1, 1995 (purpose of amendment to increase age for driver's license from 15 to 16 years); and New Jersey, N.J. STAT. ANN. § 39:3-10, effective January 1, 2001 (increased age for driver's license from17 to 18 years).

[6] *See, e.g.*, Colorado, COLO. REV. STAT. ANN. § 18-13-121, effective April 19, 1991 (increased penalties for retailers who furnish tobacco to youth under age 18 and for youth under 18 who purchase tobacco, and limited access of youth under 18 to cigarette vending machines); North Carolina, N.C. GEN. STAT. § 14-313, effective October 1, 1991 (increases age for sale of tobacco from 17 to 18 years); Pennsylvania, 18 PA. CONS. STAT. ANN.§ 6305, effective February 14, 1990 (increased age for sale or furnishing of tobacco from 16 to 18 years); and Virginia, VA. CODE ANN. § 18.2-371.2, approved March 25, 1991 (increased age for purchase or possession of tobacco from 16 to 18 years).

[7] Mississippi and Missouri prohibit jury service for youth under the age of 21 and Alabama and Nebraska prohibit youth under the age of 19 from serving on a jury. Alabama, ALA. CODE § 12-16-60; Mississippi, MISS. CODE ANN. § 13-5-1; Missouri, MO. ANN. STAT. § 494.425; and Nebraska, NEB. REV. STAT. § 25-1601.

[8] 10 U.S.C.A. § 505.

[9] 50 APP. U.S.C.A. § 454. The ban on military service is particularly instructive. As Congress noted, *inter alia*, in a resolution urging the United States to support an international ban on the use of child soldiers,

> (3) children are uniquely vulnerable to military recruitment because of their emotional and physical immaturity, are easily manipulated, and can be drawn into violence that they are too young to resist or understand; Department of Defense Appropriations Act, 1999, Pub. L. No. 105-262, § 8128, 112 Stat. 2279 (1998).

It is surely ironic to acknowledge, implicitly or explicitly, that youth are too immature to be charged with the responsibility to exercise judgment in violent, life-threatening situations in combat, where much of their behavior would be directed by adults superior to them, yet ascribe such maturity to minors in a non-combat situation where there are making decisions on their own or in the company of other youth.

[10] Alabama, ALA. CODE § 13A-12-200.5.

[11] U.S. Conference of Mayors, *A Status Report on Youth Curfews in America's Cities: A 347-City Survey* 1 (1997) (www.usmayors.org/uscm/news/publications/curfew.htm. *See also* Deidre E. Norton, *Why Criminalize Children? Looking Beyond the Express Policies Driving Juvenile Curfew Legislation*, 4 N.Y.U. J. LEGIS. & PUB. POL'Y 175, 177 & n. 10

- Foreign travel: Juveniles under the age of eighteen cannot obtain a passport for foreign travel if the custodial parent objects.

Other activities:

- Wills: In all 50 states and the District of Columbia, youth under the age of 18 cannot make a valid will.[12]
- Contracts: In all 50 states and the District of Columbia, the contract rights of youth under age 18 are restricted and/or infancy is a defense to the enforcement of a simple contract.
- Gambling: 47 states and the District of Columbia prohibit youth under the age of 18 from participating in lotteries, bingo games and/or pari-mutuel betting. Seven states (Arizona, Iowa, and Louisiana, Mississippi, Nevada, Texas and Washington) prohibit youth under the age of 21 from some forms of gambling.[13] Three states (Alabama, Alaska, and Nebraska) prohibit youth under the age of 19 from some forms of gambling.[14]
- Driving: In 42 states and the District of Columbia, a youth must be 18 years of age or older to be issued a driver's license free of restrictions or prerequisites. Virginia issues unrestricted driver's licenses only to persons 19 or older and the District of Columbia issues unrestricted driver's licenses only to persons 21 or older.[15]
- Alcohol: All 50 states and the District of Columbia set 21 as the legal age for purchasing alcohol.
- Tobacco: All 50 states and the District of Columbia prohibit either the possession or purchase of cigarettes by youth under the age of 18. Alabama, Alaska, and Utah prohibit either the possession or purchase of cigarettes by youth under the age of 19.[16]
- Tattoos: 42 states either absolutely prohibit youth under the age of 18 from obtaining a tattoo, or only allow a youth to obtain a tattoo if a parent consents. Illinois prohibits tattooing of youth under the age of 21. Illinois prohibits tattooing of youth under the age of 21.[17]
- Body piercing: In 33 states, minors under the age of 18 are either absolutely prohibited from getting body piercings or are only allowed to obtain such if a parent consents.
- Pawn shops: In 37 states, youth under the age of 18 are prohibited from engaging in transactions with pawnbrokers. Alabama prohibits youth under the age of 19 from engaging in transactions with pawnbrokers.[18]
- Firearms: Under Federal law, youth under the age of 18 cannot possess a handgun or handgun ammunition. Neither can any federally licensed importer, manufacturer, dealer, or collector sell or deliver any firearm to a juvenile under the age of 18 or any firearm, other than a shotgun or rifle, to any person under the age of 21. 46 states and the District of Columbia restrict the sale or delivery of certain firearms to youth under the age of 18 and/or prohibit the possession of certain firearms by youth under the age of 18.
- Tanning salons: 16 states prohibit youth under the age of 18 from using artificial sun tanning facilities without written

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(2000-2001) (citing William Ruefle & Kenneth Mike Reynolds, *Curfews and Delinquency in Major American Cities*, 41 CRIME & DELINQ. 347, 353 (1995) (estimating that almost 90% of the most populous cities in the U.S. impose teen curfews)).

[12] Seven states (Iowa , Kansas, Missouri, New Hampshire, Oregon, South Carolina, and Texas) allow married youth under the age of 18 to draw up wills. Iowa, IOWA CODE ANN. §§ 633.264, .3; Kansas, KAN. STAT. ANN. §§ 59-601, 38-101; Missouri, MO. ANN. STAT. § 474.310; New Hampshire, N.H. REV. STAT. ANN. § 551:1; Oregon, OR. REV. STAT. § 112.225; South Carolina, S.C. CODE ANN. §§ 62-2-501, 62-1-201; and Texas, TEX. PROB. CODE ANN. § 57. A similar exception for youth in the military exists in three states (Missouri, Indiana, and Texas), and for emancipated youth in four states (Idaho, Missouri, South Carolina, and Virginia.) Idaho, IDAHO CODE § 15-2-501; Indiana, IND. CODE § 29-1-5-1; Missouri, MO. ANN. STAT. § 474.310; South Carolina, S.C. CODE ANN. §§ 62-2-501, 62-1-201; Virginia, VA. CODE ANN. § 64.1-47; and Texas, TEX. PROB. CODE ANN. § 57.

[13] Arizona, ARIZ. REV. STAT. ANN. § § 5-512, -115; Iowa, IOWA CODE ANN. § § 99D.1, 99G.30; Louisiana, LA. REV. STAT. ANN. § 47:9025; Mississippi, MISS. CODE ANN. § 75-76-155; Nevada, NEV. REV. STAT. 463.350; Texas, TEX. REV. CIV. STAT. ANN. art. 179e; and Washington, WASH. REV. CODE ANN. § 67.16.350.

[14] Alabama, ALA. CONST. amends. 386, 387 (applies to named counties only), ALA. CODE § 11-65-44; Alaska, ALASKA STAT. § 05.15.180; and Nebraska, NEB. REV. STAT. 2-1207.

[15] District of Columbia, D.C. CODE ANN. § 50-1401.01; and Virginia, VA. CODE ANN. § 46.2-334.01.

[16] Alabama, ALA. CODE §§ 13A-12-3, 28-11-13; Alaska, ALASKA STAT. §§ 11.76.100, .105; and UTAH CODE ANN. §§ 76-10-104 to -105.

[17] Illinois, 720 ILL. COMP. STAT. 5/12-10.

[18] Alabama, ALA. CODE § 5-19A.

parental consent.

As expanded since *Stanford*, the breadth and depth of these legislative judgments about the immaturity of youth under 18, from their inability to pawn property to their inability to enlist in the military without parental consent, reflect a view of youth's limited decision-making capacity that spans virtually all aspects of life. To exempt capital punishment, which imposes the harshest penalty of all – death – from society's protection of adolescents from the mistakes of youth in virtually all other arenas, be they weighty or trivial, is illogical at best. As explained in the plurality opinion in *Thompson*:

> It would be ironic if these assumptions that we so readily make about ~~children as~~ a class – about their inherent difference from adults in their capacity as agents, as choosers, as shapers of their own lives – were suddenly unavailable in determining whether it is cruel and unusual to treat children the same as adults for the purposes of inflicting capital punishment. ... [T]he very assumptions we make about our children when we legislate on their behalf tells us that it is likely cruel, and certainly unusual, to impose on a child a punishment that takes as its predicate the existence of a fully rational, choosing agent, who may be deterred by the harshest of sanctions and toward whom society may legitimately take a retributive stance.

Thompson, 487 U.S. at 825 n. 23.

The *Stanford* plurality's unwillingness to accord the legislative consensus about the rights and responsibilities of those under 18 any relevance to the constitutionality of executing minors[19] aged 16 and 17 incorrectly conflated the maturity to know

[19] The *Stanford* plurality's argument that state statutes that limit youth autonomy in various non-criminal domains, even those that implicate constitutionally-protected activity, have "no relevance" to the Eighth Amendment inquiry, *see Stanford*, 492 U.S. at 374 (plurality opinion), is inconsistent with a long line of cases in which the Court has looked to unrelated legislation to uphold state statutes restricting youth autonomy in constitutionally-protected activities. *See, e.g., Hodgson v. Minnesota*, 497 U.S. 417, 444-445 (1990) ("The state has a strong and legitimate interest in the welfare of its young citizens, whose immaturity,

right from wrong with the maturity to be held as blameworthy as adults when youth make a plainly wrong decision. The *Stanford* plurality termed it "absurd to think that one must be mature enough to drive carefully, to drink responsibly, or to vote intelligently, in order to be mature enough to understand that murdering another human being is profoundly wrong...." *Stanford, 492 U.S.* at 374. But as the Court unequivocally held in *Atkins* with reference to the mentally retarded, the ability of a class of persons to know right from wrong is *not* the test for determining whether the imposition of the death penalty on that class of persons is constitutional:

> Mentally retarded persons frequently know the difference between right and wrong and are competent to stand trial. Because of their mental impairments, however, by definition they have diminished capacities to understand and process information, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others...Their deficiencies do not warrant an exemption from criminal sanctions, *but they do diminish their criminal culpability.*

Atkins, 536 U.S. at 318 (emphasis added) (footnote omitted).

More importantly, this entrenched legislative acceptance that adolescents are functionally limited in areas relevant to judgment and mature decision-making is indistinguishable from the Court's most recent observations about the mentally retarded. In *Atkins*, the Court's recognition that the "diminished capacities" of the mentally retarded also diminished their culpability was critical to its ruling that the execution of the mentally retarded is unconstitutional. *Id.* at 318. Youth under 18 are identical to the mentally retarded for the purposes of this Eighth Amendment analysis. *Id.* at 319-320.[20]

inexperience and lack of judgment may sometimes impair their ability to exercise their rights wisely.... That interest, which justifies state-imposed requirements that a minor obtain his or her parent's consent before undergoing an operation, marrying, or entering military service..., extends also to the minor's decision to terminate her pregnancy.") (citations omitted).

[20] These legislative and judicial boundaries delineating the more limited rights and responsibilities of youth under 18 reflect, and are drawn from, the large and growing body of scientific research outlining the psychological, neurological,

B. Supreme Court jurisprudence recognizing the differences between adolescents and adults supports the proposition that adolescents are less culpable than adults for purposes of Eighth Amendment proportionality analysis

That minors are "different" is a principle that permeates our law. As Justice Frankfurter so aptly articulated, "[C]hildren have a very special place in life which law should reflect. Legal theories and their phrasing in other cases readily lead to fallacious reasoning if uncritically transferred to determination of a State's duty towards children." *May v. Anderson*, 345 U.S. 528, 536 (1953) (Frankfurter, J., concurring). Accordingly, for the last sixty years, this Court has consistently considered the developmental and social differences of youth in measuring the scope and breadth of minors' constitutional rights. This trend has continued unabated in the fifteen years since *Stanford* was decided.

For example, this Court has repeatedly noted that minors and adults are different for the purpose of determining the voluntariness of juvenile confessions during custodial interrogation. Thus, the Court has recognized that minors are generally less mature than adults and, therefore, are more vulnerable to coercive interrogation tactics. As the Court admonished in *Haley v. Ohio*, 332 U.S. 596 (1948), a teenager

> *cannot be judged by the more exacting standards of maturity.* That which would leave a man cold and unimpressed can overawe and overwhelm a lad... [W]e cannot believe that a lad of tender years is a match for the police in such a contest. He needs counsel and support if he is not to become the victim first of fear, then of panic. He needs someone on whom to lean lest the overpowering presence of the law, as he knows it, may not crush him.

332 U.S. at 599-600 (emphasis added).

The Court also has noted that minors generally lack critical knowledge and experience, and have a lesser capacity to understand, much less exercise, their rights when they are "made accessible only to the police." *Gallegos v. Colorado*, 370 U.S. 49, 54 (1962) (finding statement taken from a 14- year-old boy outside of his parent's presence to be involuntary). And in *In re Gault*, 387 U. S. 1, 55 (1967), where the Court extended many key constitutional rights to minors subject to delinquency proceedings in juvenile court, the Court reiterated its earlier concerns about youths' special vulnerability: "The greatest care must be taken to assure that [a minor's] confession was voluntary, in the sense not only that it was not coerced or suggested, but also that it was not the product of ignorance of rights or of adolescent fantasy, fright or despair."

More recently, in this Court's *per curiam* decision in *Kaupp v. Texas*, 538 U.S. 626 (2003), where it held a 17-year-old's confession must be suppressed following an illegal arrest (absent undisclosed intervening evidence in the record) under the Fourth and Fourteenth Amendments, this Court applied earlier precedents in considering the defendant's status as a 17-year-old in its analysis:

> A *17-year-old boy* was awakened in his bedroom at three in the morning by at least three police officers, one of whom stated "we need to go and talk." .... [The boy's] 'Okay' in response to Pinkins's statement is no showing of consent under the circumstances. *Pinkins offered [the boy] no choice, and a group of police officers rousing an adolescent out of bed in the middle of the night with the words "we need to go and talk" presents no option but "to go."* There is no reason to think [the boy's] answer was anything more than "a mere submission to a claim of lawful authority."

538 U.S. at 631 (emphasis added) (citations omitted).[21]

cognitive, social and emotional deficits of youth. This research is summarized in Part III, *infra*, and in in detail in briefs of *Amici* American Psychological Association *et al.*, and *Amici* American Medical Association et al., filed separately. This body of knowledge also forms the basis of a growing, multi-disciplinary consensus among scientific experts opposed to the juvenile death penalty, as reflected in the "Health Professionals' Call to Abolish the Execution of Juvenile Offenders in the United States," attached at Appendix C, as well as the policy statement of the American Academy of Pediatrics and the Society for Adolescent Medicine, attached at Appendix D.

[21] *Yarborough v. Alvarado*, 124 S.Ct. 2140 (2004) is not to the contrary. There, the Court held only that youth was not a vital consideration when determining whether an individual is in custody for purposes of triggering *Miranda* warnings

This Court's protective stance toward youth in confession cases parallels its stance in other areas of criminal procedure. For example, the Court has emphasized the juvenile court's core principles of individualized rehabilitation and treatment, noting that youth, because they are still malleable and in development, are more amenable to such rehabilitative interventions than adults. *See McKeiver v Pennsylvania,* 403 U.S. 528, 540 (1971); *Gault*, 387 U.S. at 15-16.

Elsewhere in criminal procedure, the Court's recognition of the differences between youth and adults has led it to uphold practices directed at youth that it would not countenance if directed at adults. For instance, this Court has repeatedly held that the Fourth Amendment strictures may be relaxed when dealing with youth in public schools because youth as a class are in need of adult guidance and control. Accordingly, the Court has sustained the constitutionality of warrantless searches by school officials of students' belongings upon reasonable suspicion that a student has violated school rules or the law, *New Jersey v.T.L.O.,* 469 U.S. 325, 341-42 (1985). In the same vein, in two important post-*Stanford* decisions, the Court has upheld random, suspicionless drug testing of student athletes, *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646, 664-65 (1995), and random, suspicionless drug testing of students engaged in extracurricular activities, *Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie County v. Earls*, 536 U.S. 822, 838 (2002).

To support these Fourth Amendment rulings, the Court has observed that "[t]raditionally at common law, and still today, unemancipated minors lack some of the most fundamental rights of self-determination – including even the right of liberty in its narrow sense, i.e., the right to come and go at will. They are subject, even as to their physical freedom, to the control of their parents or guardians." *Vernonia,* 515 U.S. at 654 (citation omitted). This echoes the Court's earlier declaration in *Schall v. Martin*, 467 U.S. 253, 265 (1984), in explaining the rejection of a constitutional challenge to the preventive detention of juveniles charged with

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prior to interrogation. But *Alvarado* did not disturb this Court's prior precedents that youth is an important factor in assessing the voluntariness of a confession under the due process clause. Moreover, *Alvarado* reached the Court by way of a habeas petition; and pursuant to the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), the Court, therefore, only analyzed whether the state court's interpretation of the law in *Alvarado* was reasonable, not whether it was correct. 124 S.Ct. at 2149.

delinquent acts, that *"juveniles, unlike adults, are always in some form of custody. Children, by definition, are not assumed to have the capacity to care for themselves.* They are assumed to be subject to the control of their parents, and if parental control falters, the State must play its part as *parens patriae..."* (emphasis added) (citations omitted). *Cf. Vernonia,* 513 U.S. at 655 (when parents place their children in school they delegate custodial power to the latter, permitting the school a degree of supervision and control over their children that could not be exercised over free adults); *T.L.O.*, 469 U.S. at 339 (same).

The Court has endorsed constitutional distinctions between minors and adults outside the context of criminal procedure. In a series of cases involving state restrictions on minors' reproductive choices, the Court has said that "during the formative years of childhood and adolescence, *minors often lack the experience, perspective, and judgment to avoid choices that could be detrimental to them,*" *Bellotti v. Baird*, 443 U.S. 622, 635 (1979) (emphasis added), *as well as "the ability to make fully informed choices that take account of both immediate and long-range consequences." Id.* at 640 (emphasis added); *see also Hodgson v. Minnesota*, 497 U.S. 417, 444 (1990) ("The State has a strong and legitimate interest in the welfare of its young citizens, whose *immaturity, inexperience, and lack of judgment* may sometimes impair their ability to exercise their rights wisely.") (emphasis added). For this reason, the Court has held that states may choose to require that minors consult with their parents before obtaining an abortion. *See Hodgson*, 497 U.S. at 458 (O'Connor, J., concurring in part) (the liberty interest of a minor deciding to bear a child can be limited by parental notice requirement, given that immature minors often lack ability to make fully informed decisions); *Bellotti*, 443 U.S. at 640 (because minors often lack capacity to make fully informed choices, the state may reasonably determine that parental consent is desirable).

The Court also has curtailed the liberty interests of minors in other settings. Particularly illustrative is *Parham v. J.R.*, 442 U.S. 584 (1979), where the Court rejected a constitutional challenge to Georgia's civil commitment scheme that authorized parents and other third parties to involuntarily commit minors under the age of 18. In so doing, the Court stressed that "[m]ost children, *even in adolescence, simply are not able to make sound judgments concerning many decisions....*" *Id.* at 603 (emphasis added).

This Court has distinguished youth from adults under the First Amendment. In *Ashcroft v. American Civil Liberties Union*, 124 S.Ct. 2783 (2004), the Court was unanimous that protecting minors from harmful images on the Internet, due to their immaturity, is a compelling government interest. *Id.* at 2792; *id.* at 2801 (Breyer, J., dissenting).[22] And in *Ginsburg v. New York*, 390 U.S. 629, 637 (1968), the Court upheld a state statute restricting the sale of obscene material to minors. Such a restriction was permissible for youth, as compared to adults, because *"a child – like someone in a captive audience – is not possessed of that full capacity for individual choice* which is the presupposition of First Amendment guarantees." *Id.* at 649-50 (Stewart, J., concurring) (footnotes omitted) (emphasis added). *See also Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988) (holding that public school authorities may censor school-sponsored publications).[23]

These themes are echoed in the Court's post-*Stanford* public school prayer decisions. In holding that prayers delivered by clergy at public high school graduation ceremonies violate the Establishment Clause of the First Amendment, the Court in *Lee v. Weisman*, 505 U.S. 577 (1992), placed great emphasis on the "public pressure, as well as peer pressure," that such state-sanctioned religious practices impose on impressionable students. *Id.* at 593. The Court admonished that "[f]inding no violation under these circumstances would place objectors in the dilemma of participating [in the prayer], with all that implies, or protesting." *Id.* Of particular relevance to this case, the Court stated it was not

[22] The Court split only on whether the Child Online Protection Act used the least restrictive means, consistent with adults' First Amendment freedoms, for achieving that end. *Id.* at 2795; *id.* at 2797 (Stevens, J., concurring); *id.* at 2797 (Scalia, J., dissenting); *id.* at 2798 (Breyer, J., dissenting).

[23] Similarly, the Court has upheld a state's right to restrict when a minor can work, on the premise that "[t]he state's authority over children's activities is broader than over like actions of adults." *Prince v. Massachusetts*, 321 U.S. 158, 168 (1944). Although this Court has never ruled on the issue, lower courts also have upheld legislative restrictions on minors' liberty in the form of juvenile curfews. In upholding the constitutionality of juvenile curfews, courts have again relied on this Court's consistent refrain that minors' "immaturity, inexperience, and lack of judgment may sometimes impair their ability to exercise their rights wisely," *Qutb v. Strauss*, 11 F.3d 488, 492 (5th Cir. 1993) (quoting *Hodgson*, 497 U.S. at 444), and that juveniles lack the fundamental right in free movement. *Hutchins v. District of Columbia*, 188 F.3d 531, 538-39 (D.C. Cir. 1999) (en banc) (citing, *inter alia*, *Vernonia*, 515 U.S. at 654 and *Schall*, 467 U.S. at 265) and *Schleifer v. City of Charlottesville*, 159 F.3d 843, 847 (4th Cir. 1998) (citing, *inter alia*, *Vernonia*, 515 U.S. at 654).

addressing whether the government could put citizens to such a choice when those "affected . . . are mature adults," rather than "primary and secondary school children," who are "often susceptible to pressure from their peers towards conformity . . . in matters of social convention." *Id.* Similarly, in *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000), the Court held that prayers authorized by a vote of the student body and delivered by a student prior to the start of public high school football games violated the Establishment Clause. The Court stressed "the immense social pressure" on students "to be involved in the extracurricular event that is American high school football." *Id.* at 311. As the Court described it, "the choice between attending these games and avoiding personally offensive religious rituals is in no practical sense an easy one," *id.* at 312, and, in the high school setting, "the delivery of a pregame prayer has the improper effect of coercing those present to participate in an act of religious worship." *Id.* By contrast, the Court has upheld against an Establishment Clause challenge the delivery of prayers at the start of legislative sessions, where the audience that is present invariably is made up almost exclusively of adults. *Marsh v. Chambers*, 463 U.S. 783 (1983). *See Lee*, 505 U.S. at 597 (distinguishing between "atmosphere" at legislative sessions and public high schools).

In sum, in an unbroken line of decisions, involving a range of constitutional provisions, this Court has drawn firm distinctions between minors and adults, based on well-documented and universally accepted differences in their emotional, cognitive and developmental abilities in the critical realms of judgment and decision-making. The importance of these distinctions for purposes of the death penalty for juveniles is unmistakable. They signal the Court's

> endorse[ment of] the proposition that less culpability should attach to a crime committed by a juvenile to a comparable crime committed by an adult...The reasons why juveniles are not trusted with the privileges and responsibilities of an adult also explain why their irresponsible conduct is not as morally reprehensible as that of an adult.

Thompson, 487 U.S. at 835 (plurality opinion) (footnotes omitted).

These words, previously applied to youth under 16, today

must be extended to embrace 16 and 17 year olds. Advances in science since *Stanford;* expanded legislative and judicial restrictions on youths' autonomy; and this Court's thoughtful analysis in *Atkins* articulating the legal consequences of the impairments of mental retardation, have stripped away any principled distinction between older and younger minors for the purposes of imposing the most severe penalty allowable under our system of law – a sentence of death.

II. AS IN *ATKINS*, THE LEGISLATIVE TREND TO ABOLISH THE JUVENILE DEATH PENALTY IS A COMPELLING STATEMENT OF SOCIETY'S ATTITUDES TOWARD EXECUTING YOUTHFUL OFFENDERS, ESPECIALLY GIVEN THE WIDESPREAD ADOPTION OF LAWS ALLOWING JUVENILES TO BE TRIED IN ADULT COURT DURING THIS SAME TIME PERIOD

In *Atkins,* this Court noted that the trend in state statutes prohibiting the execution of the mentally retarded was particularly significant given that "anti-crime legislation...[has been] far more popular than legislation providing protections for persons guilty of violent crime..." *Atkins*, 536 U.S. at 315. The legislative trend since *Stanford* to eliminate the juvenile death penalty – eight more states have changed their laws to prohibit the execution of individuals for crimes committed when they were under the age of 18[24] – is equally remarkable. During this same time period, virtually all states passed laws to allow more juveniles to be tried in adult court. Patrick Griffin, National Center for Juvenile Justice and U.S. Department of Justice, *Trying and Sentencing Juveniles as Adults: An Analysis of State Transfer and Blended Sentencing Laws* 12 (October 2003); Franklin E. Zimring, AMERICAN YOUTH VIOLENCE 13-14 (1998) [hereinafter Zimring, AMERICAN YOUTH VIOLENCE]. Yet, as discussed below, these juvenile transfer laws were motivated by concerns for public safety and the inability of juvenile courts to hold offenders accountable beyond the ages of 18-21[25] – not by

[24] *See* Brief of Respondent

[25] Juvenile court jurisdiction ends in almost all states between the ages of 18 and 21. While California extends jurisdiction to age 25, CAL. WELF. & INST. CODE § 607, and some states have experimented with "blended jurisdiction," *see, e.g,* Connecticut, CONN. GEN. STAT. § 46b-133c; Kansas, KAN. STAT. ANN. § 38-1636;

legislative views on the maturity or blameworthiness of adolescent offenders. While states may have grown frustrated with the jurisdictional limits of the juvenile justice system, the juvenile death penalty gained *less*, not more, favor during this same period.

Amici further submit that the trend line of anti-juvenile death penalty legislation is even more persuasive than the parallel development noted in *Atkins,* in light of an "anti-crime" phenomenon that has no counterpart in the mental retardation arena – i.e., the concept of the juvenile "super-predator." Sociologists, criminologists and the media began using the term "super-predator" in the 1990s. *See, e.g.*, Note, Lara. A. Bazelon, *Exploding the Superpredator Myth: Why Infancy is the Preadolescent's Best Defense in Juvenile Court*, 75 N.Y.U. L. REV. 159, 177 (2000); William J. Bennett, John J. Dilulio, Jr., & John P. Walters, BODY COUNT: MORAL POVERTY -- AND HOW TO WIN AMERICA'S WAR AGAINST CRIME AND DRUGS 27 (1996).

A recurrent theme in the labeling of juveniles as super-predators was the erroneous[26] "belief that current young offenders . . . [were] *qualitatively* different from young persons who had violated the law in previous times. It . . . [was] not only the number of crimes committed that...[had] increased but also the degree of

and New Mexico, N.M. STAT. ANN. § 32A-2-20, the transfer laws of the 1990's were designed to incapacitate youth for longer periods of time than possible under juvenile court jurisdiction. *See, e.g.*, Martin L. Forst & Martha-Elin Blomquist, *Cracking Down on Juveniles: The Changing Ideology of Youth Corrections*, 5 NOTRE DAME L. J. ETHICS & PUB. POL'Y 323, 361 (1991) (noting that "the 'get-tough' approach [manifested in part by transfer provisions] is designed to incapacitate selected juvenile offenders for limited periods so that they are unable to victimize the community.")

[26] The "super-predator" concept caught the public imagination at a time immediately following sharp increases in the rate of violent offending by juveniles. Bazelon at 176-77; Philip J. Cook & John H. Laub, *After the Epidemic: Recent Trends in Youth Violence in the United States*, 29 CRIME & JUST. 1, 2-3 (2002). But just as the "super-predator" label was being touted, juvenile crime ironically began to decline. Lower rates of juvenile crime from 1994 to 2000, despite simultaneous increases in the juvenile population, led many who originally supported the "super-predator" theory to back away from their predictions. *See* David S. Tanenhaus & Steven A. Drizin, *"Owing to the Extreme Youth of the Accused": The Changing Legal Response to Juvenile Homicide*, 92 J. CRIM. L. & CRIMINOLOGY 641, 642-643 (2002); Cook & Laub at 2. It also led the Surgeon General of the United States to release a report in 2001 stating that there was "no evidence that the young people involved in crime during the peak years of the early 1990s were more frequent or more vicious offenders than youth in earlier years." YOUTH VIOLENCE: A REPORT OF THE SURGEON GENERAL 5 (2001).

viciousness displayed by the generation of serious offenders." Zimring, AMERICAN YOUTH VIOLENCE at 6. As a constant drum-beat intended to demonize youth, the later discredited "super-predator" mythology played "a dominant role in the ... public discourse and formulation of policy concerning juvenile crime." Bazelon at 165–167 & n.32, citing, *inter alia*, 2 Myron Moskovitz & Jane Grill, CRIMINAL LAW DEFENSES § 175(a) (Supp. 1999) (listing states that have amended transfer statutes to lower age at which juveniles may be waived into adult court), and David Firestone, *Arkansas Tempers a Law on Violence by Children*, N.Y. TIMES, April 11, 1999, at A20 (reporting that "over the last seven years, almost every state has made it easier for juveniles to be tried as adults") (other citations and footnotes omitted). *See also* U.S. Department of Justice, Office of Juvenile Justice and Delinquency Prevention, Juvenile Justice Bulletin: *Challenging the Myths* (February 2000), at http://www.ncjrs.org/html/ojjdp/jjbul2000_02_2/contents.html.

Yet while the "super-predator" myth played a major role in the wave of legislation that today facilitates the prosecution of more youth as adults, *Amici* submit that this transfer legislation was motivated not by any emerging view about the maturity or blameworthiness of youthful offenders, but rather by public safety considerations and the desire for greater periods of incapacitation to promote public safety. As is evident from the text of the new laws, these legislative changes were offense-, rather than offender-based[27] – in other words, while state legislatures moved broadly to make particular serious offenses committed by youth under 18 eligible for prosecution and subject to the longer sentencing options in adult criminal court, no comparable trend to lower the maximum age of juvenile court jurisdiction to less than 18 emerged. This is of course consistent with the parallel legislative trend during this same period to increase, not decrease, the number of laws restricting minors' participation in activities left open only to adults. *See Part I of brief.* Indeed, as one scholar has noted,

[27] Examples of offense (rather than offender) based transfer laws passed in the 1990's can be found in Arizona, ARIZ. CONST., art. 4, part 2 § 22 (added in 1996 to exclude violent felonies from juvenile court jurisdiction); Indiana, IND. CODE § 31-30-1-4 (amended in 1997 to remove certain felonies from the jurisdiction of juvenile court); and Massachusetts, MASS. GEN. LAWS. Ch. 119 § 74 (amended in 1996 to exclude murder from jurisdiction of juvenile court).

> The lack of consistent momentum toward lower jurisdictional age limits in the United States shows us that the shift toward punitive responses to serious youth crime is not grounded in a conception that adult levels of responsibility are acquired either earlier or more easily than in past generations. The political conflict in the United States is not about adolescent maturity but about the relevance of *immaturity* to the proper punishment of young offenders.

Franklin E. Zimring, *The Punitive Necessity of Waiver in* THE CHANGING BORDERS OF JUVENILE JUSTICE: TRANSFER OF ADOLESCENTS TO THE CRIMINAL COURT 214 (Jeffrey Fagan and Franklin E. Zimring, eds.) (2000) (emphasis added).

That no state moved to introduce a juvenile death penalty during this time of public alarm and the wholesale demonization of youthful offenders – and, in fact, eight states have gone in the opposite direction since 1989 to prohibit execution – is a strong indicator that the American public regards as excessive the execution of youthful offenders. Certainly, in light of the fear produced by the super-predator phenomena, this development carries even more weight than the parallel trend described in *Atkins* with regard to the execution of the mentally retarded.

III. RESEARCH SINCE *STANFORD* DEMONSTRATES THAT THE DETERRENT RATIONALE FOR CAPITAL PUNISHMENT IS NOT MET BY IMPOSING IT ON YOUTH UNDER 18

Youth, compared to adults, are much less capable of controlling their criminal behavior and, consequently, they are less deterrable than adults.[28] As recent social science research has shown, there are four empirically verified reasons why youth are less deterrable than adults: 1) impaired risk perception and greater risk preference; 2) foreshortened temporal perspective; 3) greater susceptibility to peer influence; and 4) a reduced "stake-in-life." *See*

[28] *Amici* refer herein to the concept of 'general deterrence' – that is, inhibition from committing crime in advance by threat or example of consequence. *See* Herbert Packer, LIMITS OF THE CRIMINAL SANCTION 39-40 (1968).

Christopher Slobogin *et al.*, *A Prevention Model of Juvenile Justice: The Promise of Kansas v. Hendricks for Children*, 1999 WIS. L. REV. 185, 196-200 (1999). Together, this evidence indicates that the average adolescent, typically defined as a youth up to eighteen, differs from the average adult in ways that diminish their willingness to pay attention to developments in the criminal law.

Common stereotypes about adolescents portray them as risk takers – more willing to take risks than adults and more likely to believe that they will avoid the negative consequences of risky behavior. Developmental psychology research supports this perception. Not only do adolescents prefer to engage in risky or sensation-seeking behavior, but, perhaps just as important, they may have different perceptions of risk itself. *See* Laurence Steinberg & Elizabeth Cauffman, *Maturity of Judgment in Adolescence: Psychosocial Factors in Adolescent Decision Making*, 20 LAW & HUM. BEHAV. 249, 260 (1996) ("The few extant comparisons of adults and adolescents suggest that thrill seeking and disinhibition [as assessed via measures of sensation seeking] may be higher during adolescence than adulthood."). For example, adolescents appear to be unaware of some risks of which adults are aware, and to calculate the probability of positive and negative consequences differently than adults.

The theoretical implications of these differences in risk perception for deterrence policies are relatively clear. Deterrence is premised on the ability of the individual to assess the benefits of engaging in criminal behavior versus the expected costs of punishment. Adolescents calculate the risks of getting caught and punished differently than adults; that is, they do not assess the certainty of punishment in the same way adults would, or indeed as they themselves would once they become adults. Adolescents are risk-takers who are more resistant to social control and less susceptible to deterrence. *See* Carl Keane et al., *Deterrence and Amplification of Juvenile Delinquency by Police Contact: The Importance of Gender and Risk-Orientation*, 29 BRIT. J. CRIMINOLOGY 336, 338 (1989) ("We suggest that those adolescents who are risk-takers will be more resistant to familial and formal control ...."). If adolescents as a class are more likely than adults to be risk-takers, then this assessment applies to the entire age group.

Issues of risk perception are closely related to those of temporal perspective, sometimes described as future orientation.

Generally, adolescents tend to focus more on short-term consequences and less on the long-term impact of a decision or behavior. *See* Elizabeth S. Scott et al., *Evaluating Adolescent Decision Making in Legal Contexts*, 19 LAW & HUM. BEHAV. 221, 231 (1995) ("In general, adolescents seem to discount the future more than adults and to weigh more heavily the short-term consequences of decisions--both risks and benefits--a response that in some settings contributes to risky behavior.") (citation omitted). This focus on the immediate makes some intuitive sense: adolescents have had less experience with long-term consequences due to their age and they may be uncertain about what the future holds for them. But this foreshortened time perspective may lead adolescents to discount the severity of punishment in a deterrence framework, particularly if it is linked to extended time periods of social control or incarceration. Capital punishment, therefore, may not trigger the same cost-benefit analysis in a 16 or 17 year old as it does in a twenty-four year-old.

Peer influence can also affect deterrability. Adolescence is usually described as a period in which childhood reliance on parents lessens as reliance on the peer group increases regarding issues of identity and acceptance. As a result, adolescents are more likely than adults to be influenced by others, both in terms of how they evaluate their own behavior and in the sense of conforming to what peers are doing. *See* Thomas J. Berndt, *Developmental Changes in Conformity to Peers and Parents*, 15 DEVELOPMENTAL PSYCHOL. 608, 615 (1979) (showing peak peer conformity at grade 9 between grades 3 and 12); Scott at 230. Because a majority of delinquent adolescent behavior occurs in groups, *see* Franklin E. Zimring, *Kids, Groups and Crime: Some Implications of a Well-Known Secret*, 72 J. CRIM. L. & CRIMINOLOGY 867, 867 (1981),[29] peer pressure may exert a powerful counterweight to the societal commands of the criminal law. Furthermore, peer involvement affects perceptions of the certainty and severity of sanctions. *See* Mark C. Stafford & Mark Warr, *A Reconceptualization of General and Specific Deterrence*, 30 J. RES. CRIME & DELINQ. 123, 132 (1993) ("[A]n intelligent offender might be tempted to draw stronger conclusions about the certainty and severity of punishment from the cumulative experiences of friends than from his or her own relatively narrow life experiences.").

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[29] "The 'well-known secret' is this: adolescents commit crimes, as they live their lives, in groups." *Id.*

A final consideration in gauging relative deterrability of youth as compared to adults is that an adolescent's position in society is different from that of an adult, as reflected in legislation and case law cited in Part I of this brief. Adolescent autonomy is more restricted than that of adults, and minors are less integrated into the pro-social responsibilities, roles, and relationships of adulthood. Developmental psychologists have documented this reduced "stake in life." *See* Slobogin at 199. Like adolescents' attitude toward risk and their foreshortened temporal perspective, this deficit may lead adolescents to underestimate the real costs of antisocial conduct. If adolescents have less stake in the future and in relationships than adults, with fewer formal social roles to risk, then the deterrent effects of these collateral costs of law-breaking are diminished. Stated another way, adolescents have had less exposure to the external constraints that create internal controls.

IV. JUVENILES, LIKE THE MENTALLY RETARDED, ARE MORE PRONE TO CONFESSING TO CRIMES THEY DID NOT COMMIT

In invalidating the death penalty as applied to the mentally retarded, this Court in *Atkins* relied on the fact that the diminished capacities of the mentally retarded increased the risk that they would falsely confess to crimes they did not commit. *Atkins*, 536 U.S. at 320-321 & n. 25. Juveniles possess many of these very same deficits and thus, like the mentally retarded, may be more prone to give false confessions when subjected to today's sophisticated psychological interrogation techniques.

Studies have shown that juveniles do not understand the words of the *Miranda* warnings as well as adults, and do not appreciate the significance and function of *Miranda* rights. *See, e.g.*, Thomas Grisso, *Juveniles' Capacities to Waive Miranda Warnings: An Empirical Analysis*, 68 Calif. L. Rev. 1134-1166 (1980). Their low social status *vis-a-vis* their adult interrogators, societal expectations that they respect authority, and their naivete in believing that police officers would not deceive them, also may make them more likely to comply with the demands of their interrogators. *See* Barry C. Feld, *Competence, Culpability, and Punishment: Implications of Atkins for Executing and Sentencing Adolescents*, 32 Hofstra L. Rev. 463 (Spring 2004, in press); *see also* Gerald Robin, *Juvenile Interrogation and Confessions*, 10 J.

Pol. Sci. & Admin. 224, 225 (1982). Moreover, their immature decision-making abilities, as well as their limited time perspective, emphasis on short-term benefits versus long-term benefits, and willingness to take risks, *see* Thomas Grisso and Laurence Steinberg et al., *Juveniles' Competence to Stand Trial: A Comparison of Adolescents and Adults' Capacities as Trial Defendants*, 27 LAW & HUMAN BEH. 333, 353- 356 (2003), make them particularly ill-suited to engage in the high stakes risk-benefits analysis that is called for in the modern psychological interrogation. [30]

There are no scientific studies proving definitively that juveniles are more likely to falsely confess than adults when subjected to psychological interrogation techniques. This is because

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[30] According to the "Decision-Making Model of Confession," *see* GISLI H. GUDJONSSON, THE PSYCHOLOGY OF INTERROGATIONS AND CONFESSIONS: A HANDBOOK at 120-122 (2003), a widely accepted psychological paradigm of police interrogations and confessions which draws heavily on rational choice theory, a suspect's decision-making during an interrogation is shaped by: 1) how the social influence techniques of the interrogation cause him to perceive his available courses of action, 2) the suspect's subjective perception of the probability that each course of action will actually occur, and 3) the utility values or gains as well as the harms that are attached to each course of action. Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C.L.Rev. 891, 913 (2004). As scholars have written:

> Psychologically-based interrogation works effectively by controlling the alternatives a person considers and by influencing how these alternatives are understood. The techniques interrogators use have been selected to limit a person's attention to certain issues, to manipulate his perceptions of his present situation, and to bias his evaluations of the choices before him. The techniques used to accomplish these manipulations are so effective that if misused, they can result in decisions to confess to the guilty and innocent alike.

Richard S. Ofshe and Richard A. Leo, *The Decision to Confess Falsely, Rational Choice and Irrational Action*, 74 DENV. U. L. REV. 979, 985 (1997) (footnote omitted). The limited decision-making skills of juveniles and their compliance to adult authority figures may make them more vulnerable to such manipulation and more likely to falsely confess.

Although research suggests that disabilities in these areas are less pronounced in 16 and 17 year olds than in younger adolescents, these studies have been conducted in pristine laboratory conditions, far removed from the stressful environment of the interrogation room where it is expected that older youths would perform less capably. *See, e.g., Taylor v. Maddox*, 366 F.3d 992, 1013 (9th Cir. 2004)("Commencing the interrogation of a [16 year old] teenager after midnight, and pressing it past 3:00 a.m. ... creates far too great a risk that a false confession will be extracted, leading to the unjust conviction of an innocent person").

it would be highly unethical to subject juvenile subjects to such stressful conditions for research purposes. Allison D. Redlich & Gail S. Goodman, *Taking Responsibility for an Act Not Committed: The Influence of Age and Suggestibility,* 27 LAW & HUMAN BEHAVIOR 141, 142 (April 2003). One recent study, however, which subjected juveniles to far less coercive circumstances than are at play in interrogations, found that juveniles were significantly more likely to accept responsibility for an act they did not commit than are adults, and that confronting juvenile subjects with false evidence of their guilt[31] only increased the likelihood that they would do so. *Id.* at 151-52.

Perhaps even more dramatic are recent studies of wrongful convictions, which demonstrate that juveniles falsely confess with some regularity. A study of 328 exonerations since the advent of DNA testing in 1989 found that fifty-one of the exonerations involved false confessions, fourteen of which involved defendants who were under 18 at the time of the crime. Samuel Gross *et al.*, *Exonerations in the United States, 1989 Through 2003* (April 19, 2004) at http://www.law.umich.edu/NewsAndInfo/exonerations-in-us.pdf. A second study by Professors Richard A. Leo and Steven A. Drizin documented 125 proven false confessions, 101 or 81 percent of which were false confessions to murder. Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World,* 82 N.C.L.Rev. 891, 947 (2004). Forty false confessors were juveniles, many of whom were juveniles aged 16 or older who confessed to murders. *Id.* at 945.[32] That juveniles may be more vulnerable to falsely confessing has also recently been accepted by John E. Reid and Associates, Inc., one of the nation's leading trainers of law enforcement in psychological interrogation techniques. In a recent memo sent to graduates of its training, Reid

[31] This is a legally permissible interrogation tactic. *See Frazier v. Cupp,* 394 U.S. 731, 739 (1969).

[32] To assist the Court in reaching its decision in the instant case, *Amici* have attached at Appendix F a summary of ten juvenile false confession cases in which 16- and 17-year-olds confessed to murders they did not commit. (This list does not include any of the five teenage defendants who falsely confessed to the attempted murder and rape of the female victim who came to be known as "the Central Park jogger." *See* Drizin & Leo at 891.) The evidence in the list is weightier than the evidence from the single case of a false confession on which the Court relied in *Miranda v. Arizona,* 384 U.S. 436, 456 n.24 (1966). Indeed, it is stronger than the evidence in *Atkins*, which also relied on one anecdotal case of a false confession. *Atkins,* 536 U.S. at 320-321, n. 25.

analyzed documented false confession cases and noted that the fact that a suspect is a juvenile "appear[s] with some regularity in false confession cases." John Reid & Associates, *False Confession—The Issues,* Monthly Investigator's Tips (April 2004), available at http://www.reid.com/investigatortips.html?serial=1080839438473936. To safeguard against false confessions, Reid instructed interrogators to "exercise extreme caution and care when interviewing or interrogating a juvenile..." *Id.* Specifically, Reid advised interrogators

> when a juvenile ... confesses, the investigator should exercise extreme diligence in establishing the accuracy of such a statement through subsequent corroboration. In these situations it is imperative that interrogators do not reveal details of the crime so that they can use the disclosure of such information by the suspect as verification of the confession's authenticity.

Id.

In addition to the risk of wrongful execution, there is substantial evidence showing that a large proportion of the juvenile offenders who have been executed since 1973 and who currently sit on death row have suffered serious brain injuries, significant neurological deficits and serious psychiatric illnesses. In addition, the overwhelming majority have suffered from extreme childhood physical and/or sexual abuse. Dorothy Otnow Lewis *et al.*, *Neuropsychiatric, Psychoeducational, and Family Characteristics of 14 Juveniles Condemned to Death in the United States*, 145 Am. J. Psychiatry 584-589 (1988), found that twelve of fourteen subjects "had been brutally physically abused and five had been sodomized by relatives... nine had major neurological impairment, seven suffered from psychotic disorders antedating incarceration, seven evidenced significant organic dysfunction...." *Id* at 584. *See also* Chris Mallett, *Socio-Historical Analysis of Juvenile Offenders on Death Row*, 39 Criminal Law Bulletin, No. 4, at 445-468 (July-August 2003). Juvenile offenders on death row experienced "traumatic life determinant factors during their childhood or adolescence." *Id. at* 455-456. Factors included psychiatric illness, brain damage, severe abuse, and mental retardation. (A subsequent and confirmatory study by Dr. Lewis *et al.*, *Neuropsychiatric, Neuropsychological, Educational, and Family Characteristics of 18 Juvenile Offenders Awaiting Execution in Texas: Adolescents in*

Transition [not yet peer reviewed, but accepted and scheduled for presentation at the April 1, 2005 symposium at Yale University's Institution for Social and Policy Studies Interdisciplinary Bioethics Project and submitted for publication to the Journal of American Academy of Psychiatry and the Law], involving a study of 18 of 26 juvenile offenders on Texas's Death Row was conducted by a board certified psychiatrist, a board certified neurologist, a research psychologist, and a certified speech pathologist/special educator. All available medical, psychological, educational, social, and family data were reviewed. Six of the offenders began life with potentially compromised central nervous system function (e.g. prematurity, respiratory distress syndrome). All but one experienced serious head traumas in childhood and adolescence. All subjects evaluated neurologically and neuropsychologically had signs of prefrontal cortical dysfunction. Fifteen (83%) met diagnostic criteria for bipolar spectrum, schizoaffective spectrum or hypomanic disorders. Two subjects were intellectually limited and one suffered from parasomnias and dissociation. All but one came from extremely violent and/or abusive families in which mental illness was prevalent in multiple generations.) *See also* A. Bechara, D. Tranel, and H. Damasio, *Characterization of the decision-making deficit of patients with ventromedial prefrontal cortex lesions,* 123 Brain 2189-2202 (2000); M. DeBellis & D. Keshavan, *Sex differences in brain maturation in maltreatment related pediatric posttraumatic stress disorder,* 27 Neuroscience and Behavioral Reviews 103-117 (2003). These impairments are known to undermine further adolescent development and compromise already immature adolescent decision-making capacities and behavior.

That juveniles face special risks for wrongful conviction, and are vulnerable in other respects, mandates that this Court hold that executing individuals for crimes committed when they were 16 or 17 years of age is prohibited by the Eighth Amendment.

CONCLUSION

For the foregoing reasons, *Amici Curiae* Juvenile Law Center *et al.*, respectfully request that the judgment of the Supreme Court of Missouri be affirmed.

Respectfully submitted,

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APPENDIX A

IDENTITY OF *AMICI CURIAE*

National Organizations

Juvenile Law Center (JLC) is one of the oldest legal service firms for children in the United States, founded in 1975 to advance the rights and well being of children in jeopardy. JLC pays particular attention to the needs of children who come within the purview of public agencies – for example, abused or neglected children placed in foster homes, delinquent youth sent to residential treatment facilities or adult prisons, or children in placement with specialized services needs. JLC works to ensure children are treated fairly by systems that are supposed to help them, and that children receive the treatment and services that these systems are supposed to provide. We believe the juvenile justice and child welfare systems should be used only when necessary, and work to ensure that the children and families served by those systems receive adequate education, and physical and mental health care. JLC is a non-profit public interest firm. Legal services are provided at no cost to our clients.

The **Child Welfare League of America (CWLA)** is an 84-year-old association of more than 1000 public and private child and family-service agencies that collectively serve more than 3 million abused, neglected and vulnerable children and youth every year. Since its inception in 1920, CWLA has been a leader in the development of quality programming, practices and policies in all areas of child welfare and child well-being. In our work with children and youth impacted by the juvenile and criminal justice systems, we have grown increasingly concerned about the link between child maltreatment and juvenile delinquency. CWLA advocates for policies and practices that seek to interrupt the path to criminal offending that is frequently the outcome for victims of child abuse and neglect. Because we know that children and adolescents have less capacity than adults to take care of themselves and make good decisions, we also advocate for policies and practices that recognize these fundamental differences and provide children and adolescents with the supports they need to negotiate

the path to adulthood. In all of our work, we strive to ensure that every child and young person is protected from harm, injustice and discrimination and is provided with the opportunity to achieve his or her full potential.

Children's Defense Fund provides a strong and effective voice for all the children in America who cannot vote, lobby, or speak out for themselves. We pay particular attention to the needs of poor, minority, and disabled children. Our goal is to educate the nation about the needs of children and encourage preventive investment in children before they get sick, drop out of school, suffer family breakdown, or get into trouble. We are a private nonprofit organization supported solely by donations from foundations, corporations, and individuals. Since 1973, CDF has been working to create a nation in which the web of family, community, private sector, and government supports for children are so tightly woven that no child can slip through. Our mission is to Leave No Child Behind® and to ensure every child a *Healthy Start*, a *Head Start*, a *Fair Start*, a *Safe Start*, and a *Moral Start* in life and successful passage to adulthood with the help of caring families and communities. CDF believes that children should be treated as children and that the purpose of the juvenile justice system is to hold children accountable for their actions while providing effective, collaborative, comprehensive and rehabilitative services that will allow them to return to productive lives in their communities. We strongly support the abolition of the death penalty for individuals whose crimes were committed as juveniles.

The **Northwestern University School of Law's Bluhm Legal Clinic** has represented poor children in juvenile and criminal proceedings since the Clinic's founding in 1969. The **Children and Family Justice Center** (CFJC) was established in 1992 at the Clinic as a legal service provider for children, youth and families and a research and policy center. Six clinical staff attorneys currently work at the CFJC, providing legal representation and advocacy for children in a wide variety of matters, including in the areas of juvenile delinquency, criminal justice, special education, school suspension and expulsion, immigration and political asylum, and appeals. CFJC staff attorneys are also law school faculty members who supervise second- and third-year law students in the

legal and advocacy work; they are assisted in this work by the CFJC's social worker and social work students.

The **Center on Children and Families** (CCF) at University of Florida's Fredric G. Levin College of Law was established in 2001, to coordinate the classroom, research and clinical programs relating to children at Florida's oldest and largest law school. CCF's mission is to promote the highest quality teaching, research and advocacy for children and their families. CCF's directors and associate directors are experts in children's law, constitutional law, criminal law, family law, and juvenile justice, as well as related areas such as psychology and psychiatry. CCF supports interdisciplinary research in areas of importance to children, youth and families, and promotes child-centered, evidence-based policies and practices in dependency and juvenile justice systems. Its faculty has many decades of experience in advocacy for children and youth in a variety of settings, including the Child Welfare Clinic and Gator TeamChild juvenile law clinic. We believe that children as a class are different from adults in significant ways, and that decisions affecting them must be informed by high quality research in child development, neurology and psychology.

The **Criminal Justice Institute** (CJI) is a curriculum-based clinical program in criminal law at Harvard Law School. Four clinical instructors supervise third-year law students, who represent indigent children and youth in delinquency proceedings and indigent defendants in district court criminal proceedings. CJI also sponsors national conferences on criminal and juvenile justice issues and is active in legislative and policy reform in areas affecting disadvantaged youth and adults.

The **Federation of Families for Children's Mental Health** is the nation's family-driven voice for children's mental health. The Federation emerged in 1989 from the grassroots efforts of many individual family members and supportive professionals committed to improving services and supports for children and youth with emotional, behavioral, or mental disorders and their families. Today, the Federation is at the hub of a powerful, culturally diverse, network driven by the committed passion of thousands of members and more than 150 chapters and State

organizations who use their collective voices to shape policies, practices, and services that support and foster healthy emotional development for all children and youth. We work in partnership with others to ensure that each child or youth, including those involved with the juvenile justice system, is viewed as a whole and complex individual and that they receive the services and supports they need to be physically and mentally healthy, to be successful in school, and participate safely in community life.

Since its inception in 2000, **the Health and Justice for Youth project (HJY) at Physicians for Human Rights** provided a medical voice to local and national campaigns and engaged in research that advances the protection of health and human rights of youth in the criminal justice system. Health professionals have a central role to play in public dialogue and decision-making on youth justice issues. Health professionals who work closely with children and adolescents, particularly pediatricians and family physicians, child and adolescent psychiatrists and psychologists, and neurologists, best understand that wise public policy must address young people's health and development. In their capacity they are able to provide valuable testimony on adolescent development and its significance to the juvenile death penalty, as well as juvenile detention facility conditions and mental health needs, among other issues. The work of the Health and Justice for Youth project includes investigating youth facilities, engaging health professionals to advocate against the juvenile death penalty based on research and science, working with the medical community to provide support to local youth justice campaigns, participating in national and state efforts for stronger legislation to protect the health and human rights of youth and research on the mental health needs of detained youth.

The **National Association of Counsel for Children** (NACC) is an IRC 501 (c) (3) not-for-profit child advocacy and professional membership association. The NACC was founded in 1977 out of the Kempe Children's Center as part of its mission to combat child maltreatment. The mission of the NACC is to improve the condition of America's court-involved children. NACC programs include professional training and technical assistance, programs to establish the practice of law for children as

a legal specialty, and policy advocacy. NACC focuses on child welfare, juvenile justice, and private custody proceedings. NACC's approximate 2000 members, representing all 50 states and the District of Columbia, include primarily attorneys and judges but also other professionals involved with children and families in the legal system. The NACC runs an *Amicus Curiae* Program through which the organization participates in appellate cases of particular importance to children and families. The NACC has appeared as *amicus curiae* in many state and federal appellate courts and the Supreme Court of the United States. The NACC enters a case only after a careful review process by the NACC *Amicus Curiae* Committee and its Board of Directors. The NACC is the recipient of the Meritorious Service to the Children of America Award presented by the National Council of Juvenile and Family Court Judges and NACC staff has received the ABA National Child Advocacy Award and the Kempe Award. NACC programs have received the support of the U.S. Dept. of HHS Children's Bureau, the ABA, the American Academy of Pediatrics, and the Child Welfare League of America.

Youth Law Center (YLC) is a national public interest law firm that has worked since 1978 on behalf of children in juvenile justice and child welfare systems. YLC has worked with judges, prosecutors, defense counsel, probation departments, corrections officials, sheriffs, police, legislators, community groups, parents, attorneys, and other child advocates throughout the country, providing public education, training, technical assistance, legislative and administrative advocacy, and litigation to protect children from violation of their civil and constitutional rights. YLC has worked for more than two decades to promote individualized treatment and rehabilitative goals in the juvenile justice system, accountability of youth for their behavior, effective programs and services for youth at risk and in trouble, consideration of the developmental differences between children and adults, and racial fairness in the justice system. With those concerns in mind, YLC opposes the imposition of the death penalty on individuals who were juveniles at the time of the offense.

The **National Center for Youth Law** (NCYL) is a private, non-profit legal organization devoted to improving the lives of poor

children in the United States. For more than 30 years, NCYL has provided support services to child advocates nationwide and direct representation in cases involving child welfare, public benefits for children and their families, legal issues involving child and adolescent health, fair housing for families with children, and juvenile justice. In particular, NCYL has participated in litigation focused on the needs of youth in the juvenile justice system throughout the country. Over the past three decades, NCYL has brought class action litigation that has led to reductions in the number of youth requiring incarceration and improved conditions and treatment for incarcerated youth. NCYL also engages in policy analysis, and administrative and legislative advocacy, on both state and national levels.

The **National Network for Youth** (NNY) is a national non-profit membership and advocacy organization committed to ensuring that young people can be safe and lead healthy and productive lives. NNY's membership includes over 600 community-based organizations nationwide. Our members provide emergency shelter, transitional living programs, counseling, and social, health, educational and job-related services for youth—operating out of school classrooms, community centers, houses, storefronts, and on the street. For the past 30 years, NNY has been dedicated to ensuring that young people have opportunities for growth and development, especially those who face greater odds because of abuse, neglect, family conflicts, and disconnection from family, lack of resources, community prejudice, differing abilities and other life challenges. The National Network for Youth's Guiding Principles and Policy Statements include advocating for the abolition of the juvenile death penalty, which is aligned to our goal of "protecting and enhancing the value of youth."

The Sentencing Project was founded in 1986 as an independent non-profit organization working for a fair and effective criminal justice system by promoting alternatives to incarceration, reforms in sentencing laws and practices, and more effective use of community-based and public services to achieve reductions in crime. To these ends, The Sentencing Project contributes research, analysis and observations of the criminal justice system to the

public debate on crime and punishment. Since 1999, The Sentencing Project has observed the trend toward prosecuting and sentencing increased numbers of juveniles in adult criminal court at the behest of the prosecution or under operation of law without benefit of judicial review. The Sentencing Project has published recommendations for defense counsel and other professionals who represent juveniles in adult court and articles analyzing the disadvantages faced by juveniles in adult court when compared to adults prosecuted for the same crimes. For these reasons and those set forth in this brief, The Sentencing Project opposes the prosecution and sentence of any juvenile to capital punishment.

Voices for America's Children is a national organization committed to working at the state and local levels to improve the well-being of children. Founded in 1984 by a small group of child advocates, Voices is the only nationwide network of state and local multi-issue child advocacy organizations that speak out on behalf of children. With member organizations in almost every state, the District of Columbia, and many cities and counties, Voices provides a voice for the voiceless - children - in city halls and state capitals across the country. Voices and its members are working to create a society that recognizes and protects the right of every child, including those involved with the juvenile justice system. Voices and its members have a long track record of working to improve the juvenile system and to foster the safety and well-being of children in its care.

The **W. Haywood Burns Institute for Juvenile Justice Fairness and Equity** works to protect and improve the lives of youth of color, poor children and their communities by ensuring fairness and equity throughout all public and private youth serving systems. The death penalty is not implemented fairly and is disproportionately imposed on people of color resulting in state sanctioned killing without appropriate processes. We join in calling for the abolition of the death penalty for minors and thereby joining the overwhelming majority of nations that have banned this barbaric practice.

Youth Advocate Program International (YAP International) works to promote and protect the rights and well-

being of the world's youth, giving particular attention to children victimized by conflict, exploitation, and state and personal violence. We provide voice and visibility for vulnerable children. In this effort, we strongly protest the execution of youth whose crimes were committed before they have reached the age of 18. In addition to our work over the past decade, for more than 20 years our parent organization, the National Youth Advocate Program (NYAP), has run treatment and rehabilitation programs for troubled youth. On many occasions, youth who were serious offenders have become conscientious and productive adults. The foster parents, advocates, and the case workers who work for the NYAP network believe that rehabilitation is possible for troubled youth; the execution of youthful offenders for actions taken during childhood is antithetical to rehabilitation.

Center for Youth as Resources (CYAR) is a national nonprofit organization, governed by a board of youth and adults who work with staff to promote the Youth as Resources (YAR) philosophy and program model. CYAR recognizes youth as valuable community resources and engages them as partners with adults in bringing about positive community change. Youth as Resources (YAR) adapted to the juvenile justice community demonstrates that young people in these settings have remarkable potential to become problem-solvers and contribute positively to their communities. Through advocacy we act as a strong and independent voice for youth in the juvenile justice system.

State and Regional Organizations

The **Bar Association of San Francisco** (BASF) is a voluntary association of more than 8,000 attorneys. The majority of its members live and work in the City and County of San Francisco, California. Through its board of directors, its committees, and its volunteer legal services programs, BASF has worked actively to improve the criminal justice and juvenile justice systems for many years. BASF's many projects related to juvenile justice include administering a court appointment program for indigents, administering and providing attorneys for the representation of parties in child dependency matters, assisting non-parent caretakers to be appointed as legal guardians of children, working with victims

of domestic violence to protect their children, and administering a program for responsible parenting.

The **Barton Child Law and Policy Clinic** (Barton Clinic) believes that policies affecting children should be based on sound research. The Barton Clinic was established in March 2000 to address the need in Georgia for an organization dedicated to effecting systemic policy and process changes for the benefit of the children in Georgia's child welfare system. The Barton Clinic helps Georgia serve neglected and abused children by providing multi-disciplinary, child-focused research, training, and support for practitioners and policymakers charged with protecting Georgia's children. The Clinic believes that children must be viewed in the context of their individual situation, their family, and their community and they should not be labeled or categorized for the convenience of systems working with them. Services should be individualized and based on child and adolescent development research.

California Women Lawyers (CWL) is a non-profit, umbrella organization for women's bar associations throughout the state of California. Chartered in 1974, CWL serves as a network that permits California's women attorneys, judges, law professors and law students to work together to achieve common goals, including the protection of civil rights of all individuals. CWL actively engages in the public policy debate concerning the rights of women and children and prepares or joins others in presenting amicus briefs in cases affecting constitutional rights, especially those having a special impact on women and children.

Carolina Legal Assistance (CLA) is a private, non-profit legal services program, which has exclusively represented clients with mental disabilities since 1978. It is CLA's mission to promote for its clients freedom of choice and quality services in the least restrictive setting. Serving children and youth with special needs is a priority for CLA, and in recent years the legal staff has assisted hundreds of individual families in their quest for an appropriate education. CLA also develops special projects intended to improve services for individuals with disabilities. One such project, The Special Education Juvenile Justice Project promotes special

education advocacy as a strategy for keeping juveniles with disabilities in school and out of prison. Another project, trains legal and law enforcement professionals about disabilities in an effort to promote accessibility to the criminal justice system on behalf of cognitively impaired defendants, victims and witnesses.

The **Central Juvenile Defender Center**, a training, technical assistance and resource development project, is housed at the Children's Law Center, Inc. In this context, it provides assistance on indigent juvenile defense issues in Ohio, Kentucky, Tennessee, Indiana, Arkansas, Missouri, and Kansas.

Children's Action Alliance (CAA) is a nonprofit, nonpartisan research, education and advocacy organization dedicated to promoting the well being of all of Arizona's children and families. Through research, publications, media campaigns, and advocacy we act as a strong and independent voice for children. CAA educates policy makers and the public about the needs of children and families and promotes effective strategies to improve the lives of children. We highlight the link between state budget and tax policy and the quality of life for children and families. We build community networks around specific issues, including health, child care, child welfare, and juvenile justice. Children's Action Alliance staff includes expertise in health policy, child development, child welfare and juvenile justice, government and fiscal administration, and law.

The **Children's Law Center, Inc.** in Covington, Kentucky has been a legal service center for children's rights since 1989, protecting the rights of youth through direct representation, research and policy development and training and education. The Center provides services in Kentucky and Ohio, and has been a leading force on issues such as access to and quality of representation for children, conditions of confinement, special education and zero tolerance issues within schools, and child protection issues. It has produced several major publications on children's rights, and utilizes these to train attorneys, judges and other professionals working with children.

Children's Law Center of Los Angeles (CLC) is a

nonprofit, public interest law corporation created over a decade ago and funded by the Los Angeles Superior Court to serve as appointed counsel for abused and neglected youth in one of the largest foster care systems in the nation. CLC's dedicated 180-person attorneys and staff serve as the "voice" in the foster care system for the vast majority of the 30,000 children under the jurisdiction of the Los Angeles County dependency court and advocate for the critical services and support these children so desperately need. On a broader organizational level, CLC strives to identify areas where systemic reforms are needed and has worked effectively locally and statewide to bring about those more far-reaching changes. Given our organization's status as the largest representative of foster youth in California, if not the nation, we are uniquely positioned to help propel important changes in the foster care system.

The recently created **Children's Law Center of the University of Richmond School of Law** serves as the umbrella organization for the law school's long established clinical programs. These clinics have represented children, at no cost, in juvenile court and special education proceedings since 1979. Recognizing that the practice of children's law requires knowledge of the intersection of many disciplines including psychology, education, social work, and child development, law students who are supervised by full time clinical faculty members work collaboratively with professionals in other fields to address the legal needs of their clients. The CLC-UR also exposes law students to the legislative process in Virginia and is currently following and supporting legislative efforts there to abolish the death penalty for offenders who were under the age of eighteen at the time of the offense.

The **Children & Youth Law Clinic** (CYLC) is an in-house legal clinic staffed by faculty and students of the University of Miami School of Law established in 1995. The CYLC serves the legal needs of children and adolescents in abuse and neglect, delinquency, criminal justice, health care, mental health, disability, independent living, education, immigration and general civil legal matters. In addition to providing legal services for clients, the CYLC has an intensive curricular component that educates law students on substantive children's law, lawyering skills, and

professional ethics. The CYLC participates in interdisciplinary research, provides training and technical assistance for lawyers, judges, and other professionals, and produces legal scholarship and practice materials on the legal needs of children.

The mission of the **State of Connecticut Office of the Child Advocate** (OCA) is to oversee the protection and care of children and to advocate for their well-being. The OCA monitors and evaluates public and private agencies that are charged with the protection of children and reviews state agency policies and procedures to ensure they protect children's rights and promote their best interest. OCA helps to advocate for children at risk; address public policy issues concerning juvenile justice, child care, foster care, and treatment; review facilities and procedures of public or private institutions or residences where juveniles are placed; and review individual cases and investigate complaints.

Florida's Children First!, Inc., ("FCF!) is a non-profit organization established in 2002 to address the serious unmet legal needs of children who require legal representation in the various legal forums that affect their lives. The mission of FCF! is to advance children's legal rights consistent with their medical, educational and social needs. Litigation, legislative and policy advocacy, executive branch monitoring, training and technical assistance to lawyers and law students, and public awareness are all tools in FCF!'s advocacy arsenal.

The **Florida Public Defender Association** represents the 20 elected Public Defenders of Florida, their 1000 appointed Assistant Public Defenders, and their statewide support staff. The Association is concerned with matters affecting the fair administration of justice for adults and juveniles in the justice system. The Association has long advocated against laws that fail to recognize the cognitive differences between adults and juveniles in ascribing criminal culpability.

The **Georgetown Law Center Juvenile Justice Clinic** is one of the oldest clinical legal education programs focusing on the needs of children. Since our founding in 1973, we have provide legal representation to children in all types of cases. Clinic staff

have also testified before Congressional and state legislative committees and before numerous boards and commissions studying the needs of youth. They have also conducted research and written extensively on these issues. Currently, two full time faculty and two graduate students serve as counsel for children in delinquency and criminal cases. Staff attorneys are supplemented each year by fourteen law students who also provide representation in delinquency cases.

JustChildren provides advocacy for children with different vulnerabilities, including mental health problems, learning disabilities, and the after-effects of crime. JustChildren is a program of the Legal Aid Justice Center, which provides civil legal representation to low income people in central Virginia. JustChildren counsels children and represents them at special education and public benefits hearings. JustChildren also conducts a Child Advocacy Clinic, established in partnership with the University of Virginia School of Law. JustChildren believes that children are developmentally different than adults and should be treated accordingly in the manner most likely to nurture their personal and educational growth into self-sustaining adults.

The **Juvenile Justice Initiative** (JJI) of Illinois is a non-profit, non-partisan, inclusive statewide coalition of state and local organizations, advocacy groups, legal educators, practitioners, community service providers, and child advocates supported by private donations from foundations, individuals, and legal firms. JJI as a coalition establishes or joins broad-based collaborations developed around specific initiatives to act together to achieve concrete improvements and lasting changes for youth in the justice system, consistent with the JJI mission statement. Our initiatives seek to create a constituency for youth in the justice system with an emphasis on promoting intervention strategies, ensuring fairness for youth in the justice system, and building community resources for comprehensive continuums of services and sanctions to reduce reliance on confinement. Our collaborations work in concert with other organizations, advocacy groups, concerned people, and state and local government entities throughout Illinois to ensure that fairness and competency development are public and private priorities for youth in the justice system.

Founded in 1997, the **Juvenile Justice Project of Louisiana** (JJPL) has established itself as a partner in efforts to reform Louisiana's juvenile justice system and to improve outcomes for at risk children and youth nationwide. We have dedicated ourselves to advocating not only for more effective less expensive alternatives to incarceration, but also for the zealous and effective representation of children in the juvenile and criminal justice systems. JJPL was founded on the recognition that children and adolescents are fundamentally different from adults and, as such, require developmentally appropriate interventions and advocacy. The manner in which the judicial system responds to young people in crisis has been a central focus of JJPL. We believe that children must be afforded essential due process protections and that such protections necessarily include a consideration of their developmental capacities and limitations. Through its work, JJPL is confronted daily with the reality that poverty, mental deficiencies, and childhood neglect or abuse, exacerbate the special vulnerabilities of youth. As such, JJPL recognizes that justice for children requires resources for competent education and rehabilitation, safety from physical and psychological violence, and meaningful accountability. JJPL joins the *Amici curiae* in opposing the imposition of the death penalty on a youth under 18 years old.

Legal Services for Children (LSC) was founded in 1975 as the first non-profit law firm established to provide free direct legal and social services to children and youth. LSC represents youth in dependency, guardianship, school expulsion, immigration and other cases. LSC uses attorney-social worker teams to assist at-risk youth in the Bay Area who need to access the legal system to stabilize or improve their lives. LSC's mission is to empower youth by increasing their active participation in making decisions about their own lives. LSC works directly with youth involved in, or at risk of involvement in the juvenile justice system.

The **Mid-Atlantic Juvenile Defender Center** (MAJDC) is a multi-faceted juvenile defense resource center that has served the District of Columbia, Maryland, Puerto Rico, Virginia and West Virginia since 2000. We are committed to working within communities to ensure excellence in juvenile defense and promote justice for all children. MAJDC promotes research and policy

development throughout the region by conducting state-based assessments of juvenile indigent defense delivery systems. Following the assessment, MAJDC staff work to ensure the report is used to educate the public about issues related to the delivery of indigent defense services for juveniles and assists the public defender systems in responding to assessment recommendations. MAJDC also responds to the needs of juvenile defenders by coordinating training programs, providing technical assistance and maintaining a list-serve of juvenile defenders to respond to defender questions. MAJDC is a 501 ©(3) non-profit organization.

The **Midwest Juvenile Defender Center** provides assistance and support to attorneys, judges, social workers, and others who work with children who are involved in the delinquency and / or criminal court systems. Forms of assistance include hosting and coordinating training sessions, providing research support on juvenile related issues, participating in state assessments of indigent defense, and keeping members abreast of developing law, social scientific and other research relating to juveniles. The Midwest Region includes the states of Illinois, Indiana, Iowa, Michigan, Minnesota, North Dakota, South Dakota, and Wisconsin.

The **New England Juvenile Defender Center, Inc.** was created in 2000 to ensure excellence in juvenile defense and promote justice for children in the juvenile justice systems of Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island and Vermont. The Center focuses primarily on supporting defenders to provide the best possible services to court-involved children and to ensure that the juvenile justice systems in New England treat children like children and provide them with real opportunities for care and treatment where appropriate. The Center has also created a Juvenile Impact Litigation Fund to support solo practitioners and organized groups of attorneys to challenge conditions of confinement in the region. The NEJDC is a non-profit public interest organization.

The **New Mexico Women's Justice Project**, located in Albuquerque, New Mexico, is a non-profit organization that seeks to eliminate a broad range of systemic barriers to social, economic and political justice faced by women, girls and their families in New Mexico. The New Mexico Women's Justice Project focuses on

women and girls whose lives are affected by the criminal justice, delinquency and child welfare systems. The Project has recently authored a study regarding state gender-specific programming and has testified on a number of incarcerated women's-oriented legislative initiatives. The Project is dedicated to providing policy and educational leadership for change that enhances lives while maintaining families and protecting our communities.

The **Northeast Regional Juvenile Defender Center** (NRJDC) is dedicated to increasing access to justice for and the quality of representation afforded to children caught up in the juvenile and criminal justice systems. Housed jointly at Rutgers Law School - Newark and the Defender Association of Philadelphia, the NRJDC provides training, support, and technical assistance to juvenile defenders in Pennsylvania, New Jersey, New York, and Delaware. The NJRDC also works to promote effective and rational public policy in the areas of juvenile detention and incarceration reform, disproportionate confinement of minority children, juvenile competency and mental health, and the special needs of girls in the juvenile justice system.

The **Northwest Juvenile Defender Center** is housed at the Defender Association in Seattle, Washington. In this context, it provides assistance on indigent juvenile defense issues in Alaska, Idaho, Montana, Nevada, Oregon, Washington, and Wyoming.

The independent **Office of the Child Advocate in New Jersey** was created by statute in September 2003. The Office of the Child Advocate investigates, reviews, monitors and evaluates State agencies responsible for serving children, and makes recommendations for systemic and comprehensive reform through investigation, policy and practice innovation, public reporting, hearings, litigation and other strategies. The Office of the Child Advocate's jurisdiction extends to all public and private settings in which a child has been placed by a State or county agency or department, including but not limited to, juvenile detention centers, group homes, foster homes, residential treatment centers and shelters. In furtherance of its investigative function, the Office of the Child Advocate has subpoena power, the power to sue state government, may conduct public hearings and is deemed a child

protective agency.

The **Office of the Juvenile Defender in Vermont** is a division of the Office of the Defender General. It was established over twenty-five years ago to provide ongoing legal representation to all children and youth who were represented in initial juvenile court proceedings by Public Defenders and as a result of those proceedings were ordered into the custody of the Commissioner of the state's child welfare agency. It also is involved in the formulation of state juvenile justice policy and legislative advocacy in the areas of juvenile justice and child abuse and neglect. The office also monitors the population of the state's juvenile detention center and provides legal representation to detained youth, monitors the out-of-state placement of adjudicated youth and provides training and legal assistance to public defenders and private attorneys statewide.

The **Office of the Maricopa County Public Defender** has represented indigent people in criminal and juvenile proceedings for almost 40 years. Our office provided representation on more than 44,000 cases in fiscal year 2003 including about 9,000 children facing delinquency and incorrigibility charges. Our office is committed to providing quality representation to all our clients. We believe that protection of our client's constitutional rights is an essential function of our office. For a child who is adjudicated delinquent or incorrigible, it is our belief that we should present the dispositional alternatives to the court that will provide the needed services for our clients and their families in the least restrictive setting. We recognize the developmental differences in children and adults and therefore recognize the need to individualize each child's circumstances. Recent information from the scientific community regarding the development of the brain, especially in children, emphasizes the need to consider the significant difference between adolescence and adulthood.

The **Pacific Juvenile Defender Center** is housed at Legal Services for Children. The Defender Center provides support, training and technical assistance for juvenile defenders throughout California and Hawaii. It is the mission of the Defender Center to improve the quality of juvenile defense in our region and ensure that juveniles are provided with holistic representation that meets their

needs.

Founded in 1802, the 12,000-member **Philadelphia Bar Association** is America's oldest chartered metropolitan bar association. Broadly representative of the profession, the Association is intimately involved with the law-related issues of the day and prides itself on its community outreach, its independence and its public interest commitment. On March 25, 2004, the Association's Board Of Governors adopted a Resolution supporting legislation prohibiting the imposition of capital punishment upon any person for any offense committed while under the age of 18. The Association notes that the United States is the only country in the world that permits, as a matter of law, the execution of persons who were under the age of 18 at the time they committed their crimes. The Philadelphia Bar Association joins with others in support of an amicus brief in the case of Roper v. Simmons and expresses its strong opposition to the use of the death penalty on juveniles.

The **Public Defender Service for the District of Columbia** (PDS) represents indigent criminal defendants, including the vast majority of children tried in the District of Columbia as adults. Although the District of Columbia discarded the death penalty for children long ago, PDS' experience in non-capital cases strongly corroborates the academic research demonstrating the particular unsuitability of capital punishment for children: Our child clients are much more likely than adults to confess falsely in order to please or influence adult authority figures; our child clients tend to be much more impulsive and immature than adults and thus much less likely to be deterred by increasing the severity of punishments; and our child clients lack the sort of autonomy in their daily lives that is vital to making reasoned choices that account for the consequences of their actions. We believe it is important for the Court to have the benefit of our real world observations as it determines whether the juvenile death penalty has any proper role in modern society.

The **San Francisco Public Defender's Office** provides legal representation per year to approximately 1,400 juveniles, aged 10-18, who are arrested and charged with delinquent offenses. The majority of the juvenile clients represented by the office come from difficult family circumstances and live in dangerous and poverty

stricken neighborhoods and are in need of legal and social services. Our juvenile clients are a very vulnerable population with needs that are substantial and involve multi-systems collaborations such as with special education, mental health, dependency and immigration. The goal of the juvenile justice system is very different form the adult system. We recognize the need to treat children going through adolescence very differently than adults.

The **Southern Juvenile Defender Center** (SJDC) works to ensure excellence in juvenile defense and promote justice for all children by enhancing the quality of representation, the capacity of the juvenile defense bar, and by educating society on the issues and processes affecting children with research and policy analysis. SJDC believes that all children should get the opportunity to realize their potential to become productive members of society and each has right to certain constitutional and statutory protections. To this end, SJDC works to ensure that the processes and laws governing the juvenile and criminal justice systems are just, applied fairly, and allow the discretion needed to serve the best interests of children and society.

The **Southwest Regional Juvenile Defender Center**, housed at the University of Houston Law Center, brings together juvenile defenders, mental health professionals, educators, legislators, and other juvenile justice professionals. Through this collaboration the Center strives to improve advocacy for children. The Center has collaborated with the American Bar Association Juvenile Justice Center, the National Juvenile Defender Center, Texas Appleseed, and other advocacy organizations to complete an assessment of the Texas juvenile justice system. That report, *Selling Justice Short: Juvenile Indigent Defense in Texas*, played an important role in passing the Fair Defense Act, which reformed both juvenile and criminal indigent defense in Texas. The Center provides training and technical support for defense attorneys representing youth. The Center also educates the general public, including citizens and multidisciplinary professionals, to promote justice for children.

The **Virginia Coalition for Juvenile Justice** is a network of parents, service providers, agency staff, advocates, and individuals

working to improve juvenile justice in Virginia. The Coalition's members include experts and leaders in the field. The Coalition seeks to insure that the Commonwealth of Virginia's juvenile justice system is fair and just; that young people and their families have a voice in the decision and policy-making process; that enlightened juvenile justice policy is a top priority for state decision-makers and public funding; and that the Commonwealth provides the services and support necessary for children who enter the system to leave in better shape than when they arrived.

The **Wisconsin Council on Children and Families** (WCCF) is a multi-issue, private non-profit organization that does research, policy development, public education and advocacy on state and federal policy changes that will positively affect the lives of children, youth and families. WCCF was founded in the late 1800s and addresses a range of issues, including juvenile justice, child welfare, workforce supports for low-income working families, health care coverage, children's brain development and K-4 through 12 education. We believe that the juvenile justice system should be a rehabilitative system that addresses the needs and competencies of the developing youth. Further, we believe that wherever possible, rehabilitative treatment should take place in the least restrictive setting possible, but, if that is not possible, that institutional treatment ought to provide treatment that is developmentally appropriate, understanding that youth continue to go through critical brain development through age 25.

APPENDIX B

State Age Requirements for Various Activities
Reproduced from the Juvenile Law Center Website
www.jlc.org/agerequirements

All 50 states, the District of Columbia and Congress have restricted the ability of youth under the age of 18 to engage in numerous activities, including activities that are constitutionally protected.

Areas of legislation are listed below in alphabetical order.

Abortion

39 states prohibit unemancipated youth under the age of 18 from obtaining an abortion without either parental consent or a judicial bypass.[1]

Alabama, ALA. CODE §§ 26-21-1 to -8
Arizona, ARIZ. REV. STAT. § 36-2152
Arkansas, ARK. CODE ANN. §§ 20-16-801 to -808
California, CAL. HEALTH & SAFETY CODE § 123450
Colorado, COLO. REV. STAT. §§ 12-37.5-101 to -108
Florida, FLA. STAT. ANN. §§ 390.01115 - .01116
Georgia, GA. CODE ANN. §§ 15-11-110 to -118
Idaho, IDAHO CODE § 18-609A
Illinois, 750 ILL. COMP. STAT. §§ 70/1 to 70/99
Indiana, IND. CODE § 16-34-2-4
Iowa, IOWA CODE § 135L.3
Kansas, KAN. STAT. ANN. §§ 65-6701, 65-6704 to -6707
Kentucky, KY. REV. STAT. ANN. § 311.732
Louisiana, LA. REV. STAT. ANN. §§ 40:1299.35.5, 40:1299.35.12
Maryland, MD. CODE ANN., HEALTH-GEN. § 20-103
Massachusetts, MASS. GEN. LAWS ch.112, §§ 12Q, 12S
Michigan, MICH. COMP. LAWS ANN. §§ 722.901-.908

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[1] ABIGAIL ENGLISH & KIRSTEN E. KENNEY, STATE MINOR CONSENT LAWS 3-193 (2d ed. Center for Adolescent Health & the Law 2003).

Minnesota, MINN. STAT. ANN. § 144.343
Mississippi, MISS. CODE ANN. §§ 41-41-51 to -63
Missouri, MO. REV. STAT. § 188.028
Montana, MONT. CODE ANN. §§ 50-20-203 to -215
Nebraska, NEB. REV. STAT. §§ 71-6901 to -6909
Nevada, NEV. REV. STAT. 442.255, 442.2555
New Jersey, N.J. STAT. ANN. §§ 9:17A-1.1 to :17A-1.12
New Mexico, N.M. STAT. ANN. § 30-5-1
North Carolina, N.C. GEN. STAT. §§ 90-21.6 to -21.10
North Dakota, N.D. CENT. CODE § 14-02.1-03, 14-02.1-03.1
Ohio, OHIO REV. CODE ANN. § 2919.121
Oklahoma, OKLA. STAT. ANN. tit. 63, § 1-740[2]
Pennsylvania, 18 PA. CONS. STAT. ANN. § 3206
Rhode Island, R.I. GEN. LAWS §§ 23-4.7-4, 23-4.7-6
South Dakota, S.D. CODIFIED LAWS §§ 26-1-1, 34-23A-1, -7, -7.1, -10.2, -22
Tennessee, TENN. CODE ANN. §§ 37-10-301 to -307
Texas, TEX. FAM. CODE ANN. §§ 33.001-.011
Utah, UTAH CODE ANN. § 76-7-304
Virginia, VA. CODE ANN. § 16.1-241
West Virginia, W. VA. CODE §§ 16-2F-1 to -9
Wisconsin, WIS. STAT. ANN. § 48.375
Wyoming, WYO. STAT. ANN. §§ 35-6-101, -118

Age of Majority

In all 50 states and the District of Columbia, the age of majority for most civil purposes is 18 or older. (Alabama and Nebraska set the age of majority at 19; Mississippi and Pennsylvania set the age of majority at 21.)[3]

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[2]Oklahoma's parental consent requirement law was held unconstitutional in *Nova Health Sys. v. Fogarty, No. 01-CV-419K* (N.D. Okla.June 17, 2002), *appeal filed*, No. 02-5094 (10th Cir. June 28, 2002), and is not being enforced.

[3]At least seven states (Alabama, Florida, Idaho, Iowa, Kansas, Nebraska, and Utah) maintain exceptions to the disabilities of minority for married youth. Alabama, ALA.CODE §§ 30-4-15, -16 (married youth age 18 and older are no longer minors); Florida, FLA. STAT. ANN. § 743.01(married youth under age 18 are no longer minors); Idaho, IDAHO CODE § 32-101 (married youth under 18 have capacity to enter contracts and sue or be sued); Iowa, IOWA CODE § 599.1 (married

Alabama, ALA. CODE § 26-1-1
Alaska, ALASKA STAT. § 25.20.010
Arizona, ARIZ. REV. STAT. § 1-215
Arkansas, ARK. CODE ANN. § 9-25-101
California, CAL. FAM. CODE § 6500
Colorado, COLO. REV. STAT. § 13-22-101
Connecticut, CONN. GEN. STAT. § 1-1d
Delaware, DEL. CODE ANN. tit. 1, § 701
District of Columbia, D.C. CODE ANN. § 46-101
Florida, FLA. STAT. ANN. § 743.07
Georgia, GA. CODE ANN. § 39-1-1
Hawaii, HAW. REV. STAT. § 577-1
Idaho, IDAHO CODE § 32-101
Illinois, 755 ILL. COMP. STAT. 5/11-1
Indiana, IND. CODE § 1-1-4-5
Iowa, IOWA CODE § 599.1
Kansas, KAN. STAT. ANN. § 38-101
Kentucky, KY. REV. STAT. ANN. § 2.015
Louisiana, LA. CIV. CODE ANN. art. 29
Maine, ME. REV. STAT. ANN. tit. 1, § 73
Maryland, MD. ANN. CODE art. 1, § 24
Massachusetts, MASS. GEN. LAWS ch. 4, § 7, cl. 51; MASS. GEN. LAWS ch. 231, § 85P
Michigan, MICH. COMP. LAWS ANN. § 722.52
Minnesota, MINN. STAT. ANN. §§ 645.45, .451, .452
Mississippi, MISS. CODE. ANN. § 1-3-27
Missouri, MO. REV. STAT. § 431.055[4]

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youth under age 18 are no longer minors); Kansas, KAN. STAT. ANN. § 38-101 (youth age 16 or older who are married are no longer minors for matters relating to contracts, property rights, liabilities and the capacity to sue and be sued); Nebraska, NEB. REV. STAT. § 43-2101 (married youth under 19 who are married are no longer minors); and Utah, UTAH CODE ANN. § 15-2-1 (youth under 18 who are married are no longer minors). Three states (Nevada, Pennsylvania, and Wisconsin) make other limited exceptions to their age of majority restrictions. Nevada, NEV. REV. STAT. 129.010 (emancipated youth under the age of 18 are not considered minors); Pennsylvania, 23 PA. CONS. STAT. ANN. § 5101 (the age of majority for the right to contract and to sue and be sued is 18); and Wisconsin, WIS. STAT. ANN. § 990.01 (age of majority for purposes of investigating or prosecuting a person who is alleged to have violated any law is 17).

[4]*See also, Orth v. Orth*, 637 S.W.2d 201, 205 (Mo. Ct. App. 1982).

Montana, MONT. CONST. art. II, § 14
Nebraska, NEB. REV. STAT. § 43-2101
Nevada, NEV. REV. STAT. 129.010
New Hampshire, N.H. REV. STAT. ANN. § 21:44
New Jersey, N.J. STAT. ANN. §§ 9:17B-1, -3
New Mexico, N.M. STAT. ANN. § 28-6-1
New York, N.Y. C.P.L.R. 105; N.Y. DOM. REL. LAW § 2; N.Y. GEN. OBLIG. LAW § 1-202
North Carolina, N.C. GEN. STAT. § 48A-2
North Dakota, N.D. CENT. CODE § 14-10-01
Ohio, OHIO REV. CODE ANN. § 3109.01
Oklahoma, OKLA. STAT. ANN. tit. 15, § 13
Oregon, OR. REV. STAT. § 109.510
Pennsylvania, 1 PA. CONS. STAT. ANN. § 1991; 23 PA. CONS. STAT. ANN. § 5101
Rhode Island, R.I. GEN. LAWS § 15-12-1
South Carolina, S.C. CODE ANN. § 15-1-320
South Dakota, S.D. CODIFIED LAWS § 26-1-1
Tennessee, TENN. CODE ANN. § 1-3-105
Texas, TEX. CIV. PRAC. & REM. CODE ANN. § 129.001
Utah, UTAH CODE ANN. § 15-2-1
Vermont, VT. STAT. ANN. tit. 1, § 173
Virginia, VA. CODE ANN. § 1-13.42
Washington, WASH. REV. CODE § 26.28.010
West Virginia, W. VA. CODE § 2-3-1
Wisconsin, WIS. STAT. ANN. § 990.01
Wyoming, WYO. STAT. ANN. § 14-1-101

Alcohol

All 50 states and the District of Columbia prohibit the purchase of alcohol by, or the sale of alcohol to, youth under the age of 21.

Alabama, ALA. CODE § 28-1-5
Alaska, ALASKA STAT. § 04.16.050
Arizona, ARIZ. REV. STAT. § 4-101
Arkansas, ARK. CODE ANN. § 3-3-203
California, CAL. HEALTH & SAFETY CODE § 11999
Colorado, COLO. REV. STAT. § 12-47-901
Connecticut, CONN. GEN. STAT. § 30-86

Delaware, DEL. CODE ANN. tit. 4, § 708
District of Columbia, D.C. CODE. ANN. § 25-1002
Florida, FLA. STAT. ANN. § 562.111
Georgia, GA. CODE ANN. § 3-3-23
Hawaii, HAW. REV. STAT. ANN. § 712-1250.5
Idaho, IDAHO CODE § 23-604
Illinois, 235 ILL. COMP. STAT. 5/6-16
Indiana, IND. CODE § 7.1-5-7-1
Iowa, IOWA CODE § 123.3
Kansas, KAN. STAT. ANN. § 41-727
Kentucky, KY. REV. STAT. ANN. § 244.085
Louisiana, LA. REV. STAT. ANN. § 93.12
Maine, ME. REV. STAT. ANN. tit. 19A, § 652
Maryland, MD. ANN. CODE art. 2B, § 1-201
Massachusetts, MASS. GEN. LAWS ch. 138, § 34C
Michigan, MICH. COMP. LAWS § 436.1703
Minnesota, MINN. STAT. § 340A.503
Mississippi, MISS. CODE ANN. § 67-3-70
Missouri, MO. REV. STAT. § 311.325
Montana, MONT. CODE ANN. § 16-3-301
Nebraska, NEB. REV. STAT. §§ 53-103, -180
Nevada, NEV. REV. STAT. 202.020
New Hampshire, N.H. REV. STAT. ANN. § 179.10
New Jersey, N.J. STAT. ANN. § 9:17B-1
New Mexico, N.M. STAT. ANN. § 60-3A
New York, N.Y. ALCO. BEV. CONT. § 65c
North Carolina, N.C. GEN. STAT. § 18B-302
North Dakota, N.D. CENT. CODE 5-01-08
Oklahoma, OKLA. STAT. tit. 37, § 604
Ohio, OHIO REV. CODE ANN. § 43-01-22
Oregon, OR. REV. STAT. § 471.105
Pennsylvania, 18 PA. CONS. STAT. ANN. § 6308
Rhode Island, R.I. GEN. LAWS § 3-8-6
South Carolina, S.C. CODE ANN. § 61-4-50
South Dakota, S.D. CODIFIED LAWS § 35-4-78
Tennessee, TENN. CODE ANN. § 57-4-20
Texas, TEX. ALCO. BEV. CODE ANN. § 106.01
Utah, UTAH CODE ANN. § 32A-1-105
Vermont, VT. STAT. ANN. tit. 7, § 2
Virginia, VA. CODE ANN. § 4.1-304

Washington, WASH. REV. CODE § 66.44.290
West Virginia, W. VA. CODE § 60-3-22
Wisconsin, WIS. STAT. § 125.02
Wyoming, WYO. STAT. ANN. § 12-6-101

Body Piercing

In 33 states, minors under the age of 18 are either absolutely prohibited from getting body piercings or are only allowed to obtain such if a parent consents.[5]

Alabama, ALA. ADMIN. CODE r. 420-3-23-.03
Alaska, ALASKA STAT. § 08.13.217
Arizona, ARIZ. REV. STAT. § 13-3721

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[5]Of the 33 states with laws regulating minors' ability to obtain body piercing services, at least 30 states passed their laws since 1989, with at least 19 states passing those laws within the past five years (1999-2004). Alabama, ALA. ADMIN. CODE r. 420-3-23-.03, effective April 19, 2001; Alaska, ALASKA STAT. § 08.13.217, effective September 1, 2000; Arizona, ARIZ. REV. STAT. § 13-3721, added by amendment, 1999; Arkansas, ARK. CODE ANN. § 20-27-1502, effective August 13, 2001; California, CAL. PENAL CODE § 652, added by statute, 1997; Connecticut, CONN. GEN. STAT. ANN. § 19a-92g, effective October 1, 1999; Florida, FLA. STAT. ANN. § 381.0075, effective October 1, 1999; Georgia, GA. CODE ANN. § 16-5-71.1, added by statute, 1996; Illinois, 720 ILL. COMP. STAT. 5/12-10.1, effective September 5, 1999; Indiana, IND. CODE § 35-42-2-7, added by amendment, May 5, 1999; Kansas, KAN. STAT. ANN. § 65-1953, effective 1996; Kentucky, KY. REV. STAT. ANN. § 211.760, added by amendment, April 2, 2002; Louisiana, LA. REV. STAT. ANN. § 14:93.2, added by amendment, July 7, 1997; Maine, ME. REV. STAT. ANN. tit. 32, § 4323, added by statute, 1997; Michigan, MICH. COMP. LAWS ANN. § 333.13102, effective September 1, 1996; Mississippi, MISS. CODE ANN. § 73-61-3, effective July 1, 2000; Missouri, MO. ANN. STAT. § 324.520, effective October 13, 1999; New Hampshire, N.H. REV. STAT. ANN. § 314-A:8, effective January 1, 2003; New Jersey, N.J. STAT. ANN. § 2C:40-21, effective November, 2001; North Carolina, N.C. GEN. STAT. § 14-400, effective December 1, 1998; Ohio, OHIO REV. CODE ANN. § 3730.06, effective October 14, 1997; Oklahoma, OKLA. STAT. ANN. tit. 21, § 842.1, effective November 1, 1998; Oregon, OR. ADMIN. R. 331-220-0080, effective November 1, 2001; South Carolina, S.C. CODE ANN. § 44-32-120, effective October 1, 2000; Texas, TEX. HEALTH & SAFETY CODE ANN. § 146.0125, effective September 1, 1999; Utah, UTAH CODE ANN. § 76-10-2201, effective May 4, 1998; Vermont, VT. STAT. ANN. tit. 26, § 4102, effective June 13, 2002; Virginia, VA. CODE ANN. § 18.2-371.3, added by amendment, March 15, 2001; Wisconsin, WIS. ADMIN. CODE § 173.05, effective August 1, 1998; and Wyoming, WYO. STAT. ANN. § 14-3-107, effective July 1, 2004.

Arkansas, ARK. CODE ANN. § 20-27-1502
California, CAL. PENAL CODE § 652
Connecticut, CONN. GEN. STAT. ANN. § 19a-92g
Delaware, DEL. CODE ANN. tit 11, § 1114
Florida, FLA. STAT. ANN. § 381.0075
Georgia, GA. CODE ANN. § 16-5-71.1
Illinois, 720 ILL. COMP. STAT. 5/12-10.1
Indiana, IND. CODE § 35-42-2-7
Kansas, KAN. STAT. ANN. § 65-1953
Kentucky, KY. REV. STAT. ANN. § 211.760
Louisiana, LA. REV. STAT. ANN. § 14:93.2
Maine, ME. REV. STAT. ANN. tit. 32, § 4323
Maryland, MD. REGS. CODE tit. 10, § 10.06.01.06
Michigan, MICH. COMP. LAWS ANN. § 333.13102
Mississippi, MISS. CODE ANN. § 73-61-3
Missouri, MO. ANN. STAT. § 324.520
New Hampshire, N.H. REV. STAT. ANN. § 314-A:8
New Jersey, N.J. STAT. ANN. § 2C:40-21
North Carolina, N.C. GEN. STAT. § 14-400
Ohio, OHIO REV. CODE ANN. § 3730.06
Oklahoma, OKLA. STAT. ANN. tit. 21, § 842.1
Oregon, OR. ADMIN. R. 331-220-0080
Rhode Island, R.I. GEN. LAWS § 23-1-39
South Carolina, S.C. CODE ANN. § 44-32-120
Texas, TEX. HEALTH & SAFETY CODE ANN. § 146.0125
Utah, UTAH CODE ANN. § 76-10-2201
Vermont, VT. STAT. ANN. tit. 26, § 4102
Virginia, VA. CODE ANN. § 18.2-371.3
Wisconsin, WIS. ADMIN. CODE § 173.05
Wyoming, WYO. STAT. ANN. § 14-3-107[6]

Cigarettes

All 50 states and the District of Columbia prohibit either the possession or purchase of cigarettes by youth under the age of 18. (Alabama, Alaska, and Utah prohibit either the possession or purchase of cigarettes by youth under the age of 19.)

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[6](amended 2004)

Alabama, ALA. CODE §§ 13A-12-3, 28-11-13
Alaska, ALASKA STAT. §§ 11.76.100, .105
Arizona, ARIZ. REV. STAT. § 13-3622
Arkansas, ARK. CODE ANN. § 5-27-227
California, CAL. PENAL CODE § 308
Colorado, COLO. REV. STAT. ANN. § 18-13-121
Connecticut, CONN. GEN. STAT. ANN. § 53-344
Delaware, DEL. CODE ANN. tit. 11, § 1124
District of Columbia, D.C. CODE ANN. § 22-1320
Florida, FLA. STAT. ANN. § 569.101
Georgia, GA. CODE ANN. § 16-12-171
Hawaii, HAW. REV. STAT. § 709-908
Idaho, IDAHO CODE § 39-5703
Illinois, 720 ILL. COMP. STAT. 675/1
Indiana, IND. CODE §§ 35-46-1-10, -10.5
Iowa, IOWA CODE ANN. § 453A.2
Kansas, KAN. STAT. ANN. § 79-3321
Kentucky, KY. REV. STAT. ANN. §§ 438.310, .311
Louisiana, LA. REV. STAT. ANN. § 14.91.8
Maine, ME. REV. STAT. ANN. tit. 22, § 1555-B
Maryland, MD. CODE ANN., CRIM. §§ 10-107 to -108
Massachusetts, MASS. GEN. LAWS ANN. ch. 270, § 6
Michigan, MICH. COMP. LAWS ANN. §§ 722.641–.642
Minnesota, MINN. STAT. ANN. § 609.685
Mississippi, MISS. CODE ANN. § 97-32-5
Missouri, MO. ANN. STAT. § 407.933
Montana, MONT. CODE ANN. §§ 16-11-305, 45-5-637
Nebraska, NEB. REV. STAT. §§ 28-1418, -1419, -1427
Nevada, NEV. REV. STAT. 202.2493
New Hampshire, N.H. REV STAT. §§ 126-K:4, :6
New Jersey, N.J. STAT. ANN. § 2A:170-51.4
New Mexico, N.M. STAT. ANN. § 30-49-3
New York, N.Y. PUB. HEALTH LAW § 1399-cc
North Carolina, N.C. GEN. STAT. § 14-313
North Dakota, N.D. CENT. CODE § 12.1-31-03
Ohio, OHIO REV. CODE ANN. §§ 2927.02; 2151.87
Oklahoma, OKLA. STAT. ANN. tit. 37, §§ 600.3–.4
Oregon, OR. REV. STAT. §§163.575, 167.400
Pennsylvania, 18 PA. CONS. STAT. ANN. § 6305
Rhode Island, R.I. Gen. Laws §§ 11-9-13 to -14

South Carolina, S.C. CODE ANN. § 16-17-500
South Dakota, S.D. CODIFIED LAWS § 34-46-2
Tennessee, TENN. CODE ANN. §§ 39-17-1504 to -1505
Texas, TEX. HEALTH & SAFETY CODE ANN. §§ 161.082, .252
Utah, UTAH CODE ANN. §§ 76-10-104 to -105
Vermont, VT. STAT. ANN. tit. 7, §§ 1005, 1007
Virginia, VA. CODE ANN. § 18.2-371.2
Washington, WASH. REV. CODE ANN. §§ 26.28.080, 70.155.080
West Virginia, W. VA. CODE §§ 16-9A-2 to -3
Wisconsin, WIS. STAT. §§ 134.66, 254.92
Wyoming, WYO. STAT. ANN. §§ 14-3-302, -304, -305

Contracts

In all 50 states and the District of Columbia, the contract rights of youth under age 18 are restricted and/or infancy of the obligor is a defense to the enforcement of a simple contract.[7]

Alabama, ALA.CODE §§ 7-3-305 (infancy is a defense), 26-1-1 (age of majority is 19)
Alaska, ALASKA STAT. § 45.03.305 (infancy is a defense), 25.20.010 (person over age 18 has rights of citizen of full age), 09.55.590 (minor who has disability removed has capacity to contract)
Arizona, ARIZ. REV. STAT. §§ 47-3305 (infancy is a defense), 44-131 (youth under 18 who are veterans or married to adults are exempted from disability by reason of age and have capacity to contract)
Arkansas, ARK. CODE ANN. §§ 4-3-305 (infancy is a defense), 9-25-101 (age of majority is 18)
California, CAL. COM. CODE § 3305 (infancy is a defense), CAL. FAM. CODE § 6700 (minor cannot make a contract regarding real property or personal property not in minor's possession and minor has power to disaffirm contract), CAL. FAM. CODE § 6710 (minor can disaffirm contract)
Colorado, COLO. REV. STAT. ANN. §§ 4-3-305 (infancy is a defense), 13-22-101 (persons 18 or older have capacity to enter into contracts)
Connecticut, CONN. GEN. STAT. ANN. §§ 42a-3-305 (infancy is a defense), 1-1d (infant defined as person under age 18)

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[7]States typically allow minors to contract for insurance and postsecondary educational loans.

Delaware, DEL. CODE ANN. tit. 6, §§ 3-305 (infancy is a defense), 2705 (persons age 18 or older have full capacity to contract)
District of Columbia, D.C. CODE ANN. §§ 28:3-305 (infancy is a defense), 46-101 (age of majority is 18)
Florida, FLA. STAT. ANN. §§ 673.3051 (infancy is a defense), 743.07 (disabilities of nonage end at age 18) 743.01 (disabilities of nonage dissolved for minor who marries; married minor has right to contract)
Georgia, GA. CODE ANN. §§ 11-3-305 (infancy is a defense), 39-1-1 (age of majority is 18), 13-3-20 (minors' contracts are voidable)
Hawaii, HAW. REV. STAT. §§ 490:3-305 (infancy is a defense), 577-1 (age of majority is 18)
Idaho, IDAHO CODE §§ 28-3-305 (infancy is a defense), 29-101 (minors are incapable of contracting), 32-101 (married minors are competent to contract), 32-103 (minors can disaffirm contracts)
Illinois, 810 ILL. COMP. STAT. 5/3-305 (infancy is a defense), 755 ILL. COMP. STAT. 5/11-1 (minor defined as person under age 18), 750 ILL. COMP. STAT. 30/5 (emancipated minors have right to enter into legal contracts)
Indiana, IND. CODE § § 26-1-3.1-305 (infancy is a defense), 1-1-4-5 (defines infant as person under age 18)
Iowa, IOWA CODE ANN. §§ 554.3305 (infancy is a defense), 599.1 (age of majority is 18 or upon marriage), 599.2 (minors can disaffirm contracts)
Kansas, KAN. STAT. ANN. §§ 84-3-305 (infancy is a defense), 38-101 (age of majority is 18, but married minors age 16 and older have capacity to contract)
Kentucky, KY. REV. STAT. ANN. §§ 355.3-305 (infancy is a defense), 2.015 (age of majority is 18)
Louisiana, LA. REV. STAT. ANN. § 10:3-305 (infancy is a defense), LA. CIV. CODE ANN. Art. 1918 (unemancipated minors do not have capacity to contract)
Maine, ME. REV. STAT. ANN. tit. 11, § 3-1305 (infancy is a defense), tit. 33, § 52 (minor's contract must be ratified in writing by person of full age to be actionable)
Maryland, MD. CODE ANN., COM. LAW §§ 3-305 (infancy is a defense), 1-103 (age of majority for capacity to contract is 18)
Massachusetts, MASS. GEN. LAWS ANN. ch. 106, § 3-305 (infancy is a defense), ch. 231, § 850 (persons age 18 and older have capacity to contract)

Michigan, MICH. COMP. LAWS ANN. §§ 440.3305 (infancy is a defense), 722.52 (persons 18 and older have legal capacity of adults)
Minnesota, MINN. STAT. ANN. §§ 336.3-305 (infancy is a defense), 645.45 (minor defined as person under age 18), 645.451 (minor defined as person under age 18), 645.452 (disabilities of minority end at age 18)
Mississippi, MISS. CODE ANN. §§ 75-3-305 (infancy is a defense), 93-19-9 (minors who have disabilities removed have capacity to make contracts)
Missouri, MO. ANN. STAT. §§ 400.3-305 (infancy is a defense), 431.055 (person becomes competent to contract at age 18)
Montana, MONT. CODE ANN. §§ 30-3-305 (infancy is a defense), 28-2-201 (minors are not capable of contracting)
Nebraska, NEB. REV. STAT. §§ 3-305 (infancy is a defense), 43-2101 (age of majority is 19 or upon marriage)
Nevada, NEV. REV. STAT. §§ 104.3305 (infancy is a defense), 129.010 (minors age 18 and older and emancipated minors have capacity to enter into contracts)
New Hampshire, N.H. REV. STAT. ANN. §§ 382-A:3-305 (infancy is a defense), 21:44 (age of majority is 18)
New Jersey, N.J. STAT. ANN. §§ 12A:3-305 (infancy is a defense), 9:17B-1 (persons age 18 and older have right to contract)
New Mexico, N.M. STAT. ANN. §§ 55-3-305 (infancy is a defense), 32A-21-5 (emancipated minor has capacity to contract)
New York, N.Y. U.C.C. LAW § 3-305 (holder in due course takes instrument free from defense of infancy), N.Y. C.P.L.R. 105 (infant defined as person under age 18)
North Carolina, N.C. GEN. STAT. §§ 25-3-305 (infancy is a defense), 48A-2 (minor defined as person under age 18)
North Dakota, N.D. CENT. CODE §§ 41-03-31 (infancy is a defense), 9-02-01 (minors do not have capacity to contract), 14-10-11 (minor can disaffirm contract)
Ohio, OHIO REV. CODE ANN. §§ 1303.35 (infancy is a defense), 3109.01 (persons 18 or older have capacity to contract)
Oklahoma, OKLA. STAT. ANN. tit. 12A, § 3-305 (infancy is a defense), tit. 15 §§ 11 (minors do not have capacity to contract), 17 (minor cannot make a contract regarding real property or personal property not in his control)
Oregon, OR. REV. STAT. §§ 73.0305 (infancy is a defense), 109.510 (persons 18 and older have rights of citizen of full age)

Pennsylvania, 13 PA. CONS. STAT. ANN. § 3305 (infancy is a defense), 23 PA. CONS. STAT. ANN. § 5101 (persons over age 18 can enter into binding contracts)
Rhode Island, R.I. GEN. LAWS §§ 6A-3-305 (infancy is a defense), 15-12-1 (age for assumption of legal rights is 18)
South Carolina, S.C. CODE ANN. §§ 36-3-305 (infancy is a defense), 15-1-320 (minors defined as persons under age 18), 20-7-250 (contracts made in writing by infants must be ratified in writing by person of full age to be actionable)
South Dakota, S.D. CODIFIED LAWS §§ 57A-3-305 (infancy is a defense), 26-2-1 (minor cannot make a contract regarding real property or personal property not in his control), 26-2-3 (minors may disaffirm contracts)
Tennessee, TENN. CODE ANN. § 47-3-305 (infancy is a defense), 29-31-105 (minor who has disabilities removed is empowered to contract)
Texas, TEX. BUS. & COM. CODE ANN. § 3.305 (infancy is a defense), TEX. FAM. CODE ANN. § 31.006 (minor who has disabilities removed has capacity to contract)
Utah, UTAH CODE ANN. §§ 70A-3-305 (infancy is a defense), 15-2-2 (minor bound by contracts unless he disaffirms them)
Vermont, VT. STAT. ANN. tit. 9A, § 3-305 (infancy is a defense), tit. 1, § 173 (minors are persons under age 18)
Virginia, VA. CODE ANN. §§ 8.3A-305 (infancy is a defense), 1-13.42 (defines infant as person under age 18)
Washington, WASH. REV. CODE ANN. § § 62A.3-305 (infancy is a defense), 26-28-030 (minor bound by contracts unless he disaffirms them)
West Virginia, W. VA. CODE §§ 46-3-305 (infancy is a defense), 2-3-1 (no person age 18 or older lacks capacity by reason of age to enter into contracts)
Wisconsin, WIS. STAT. ANN. §§ 403.305 (infancy is a defense), 990.01 (age of majority is 18)
Wyoming, WYO. STAT. ANN. §§ 34.1-3-305 (infancy is a defense), 14-1-101 (youth age 18 or older can enter into a binding contract)

Driving

In 42 states and the District of Columbia, a youth must be 18 years of age or older to be issued a driver's license free of restrictions or

prerequisites. (Virginia issues unrestricted driver's licenses only to persons 19 or older and the District of Columbia issues unrestricted driver's licenses only to persons 21 or older.)

Alabama, ALA. CODE § 32-6-7.2
Alaska, ALASKA STAT. § 28.15.031
Arizona, ARIZ. REV. STAT. ANN. § 28-3153
Arkansas, ARK. CODE. ANN. § 27-16-604
California, CAL. VEHICLE CODE § 12512
Connecticut, CONN. GEN. STAT. § 14-36
Delaware, DEL. CODE ANN. tit. 21, § 2707
District of Columbia, D.C. CODE ANN. § 50-1401.01
Florida, FLA. STAT. ANN. § 322.05
Georgia, GA. CODE ANN. § 40-5-22
Hawaii, HAW. REV. STAT. ANN. § 286-104
Illinois, 625 ILL. COMP. STAT. 5/6- 103
Indiana, IND. CODE § 9-24-3-2
Iowa, IOWA CODE § 321.177
Kansas, KAN. STAT. ANN. § 8-237
Kentucky, KY. REV. STAT. ANN. § 186.440
Louisiana, LA. REV. STAT. ANN. § 32:405.1
Maine, ME. REV. STAT. ANN. tit. 29-A, § 1302
Maryland, MD. CODE. ANN., TRANSP. I § 16-103
Massachusetts, MASS. GEN. LAWS. ANN. ch. 90, § 8
Michigan, MICH. COMP. LAWS ANN. § 257.308
Minnesota, MINN. STAT. § 171.04
Missouri, MO. ANN. STAT. § 302.060
Nebraska, NEB. REV. STAT. § 60-480
Nevada, NEV. REV. STAT. 483.250
New Hampshire, N.H. REV. STAT. ANN. § 263:16
New Jersey, N.J. STAT. ANN. § 39:3-10
New Mexico, N.M. STAT. ANN. § 66-5-5
New York, N.Y. VEH. & TRAF. LAW § 502
North Carolina, N.C. GEN. STAT. § 20-9
Ohio, OHIO REV. CODE. ANN. § 4507.07
Oklahoma, OKLA. STAT. tit. 47, § 6-103
Oregon, OR. REV. STAT. § 807.060
Pennsylvania, 75 PA. CONS. STAT. § 1503
Rhode Island, R.I. GEN. LAWS § 31-10-6
South Dakota, S.D. CODIFIED LAWS § 32-12-6

Tennessee, TENN. CODE ANN. § 55-50-312
Texas, TEX. TRANSP. CODE ANN. § 521.204
Utah, UTAH CODE ANN. § 53-3-204
Virginia, VA. CODE ANN. § 46.2-334.01
Vermont, VT. STAT. ANN. tit. 23, § 606
West Virginia, W. VA. CODE § 17B-2-3
Wisconsin, WIS. STAT. § 343.06

Firearms

Under Federal law, youth under the age of 18 cannot possess a handgun or handgun ammunition. Neither can any federally licensed importer, manufacturer, dealer, or collector sell or deliver any firearm to a juvenile under the age of 18 or any firearm, other than a shotgun or rifle, to any person under the age of 21. 18 U.S.C.A. § 922.

46 states and the District of Columbia restrict the sale or delivery of certain firearms to youth under the age of 18 and/or prohibit the possession of certain firearms by youth under the age of 18.[8]

37 states and the District of Columbia either absolutely prohibit the sale or delivery of certain firearms to juveniles under the age of 18, or only allow the sale or delivery with parental consent.
Eight states (Connecticut, Delaware, Hawaii, Iowa, Maryland, Massachusetts, Ohio, and South Carolina) and the District of Columbia prohibit the sale or delivery of certain firearms to youth

[8]In addition, Missouri and Wyoming prohibit youth under the age of 21 from procuring a permit to carry a concealed firearm. Missouri, MO. ANN. STAT. §571.090; Wyoming, WYO. STAT. ANN. § 6-8-104.

under the age of 21.[9] New York prohibits the sale or delivery of certain firearms to youth under the age of 19.[10]

Alabama, ALA. CODE §§ 13A-11-57, -76
Alaska, ALASKA STAT. § 11.61.210
Arizona, ARIZ. REV. STAT. ANN. § 13-3109
Arkansas, ARK. CODE ANN. § 5-73-109
Colorado, COLO. REV. STAT. ANN. § 18-12-108.7
Connecticut, CONN. GEN. STAT. ANN. § 29-34
Delaware, DEL. CODE ANN. tit. 24, § 903
District of Columbia, D.C. CODE ANN. § 22-4507
Florida, FLA. STAT. ANN. § 790.18
Georgia, GA. CODE ANN. § 16-11-101.1
Hawaii, HAW. REV. STAT. ANN. § 134-2
Idaho, IDAHO CODE § 18-3302A
Illinois, 720 ILL. COMP. STAT. ANN. 5/24-3
Indiana, IND. CODE ANN. § 35-47-2-7
Iowa, IOWA CODE ANN. § 724.22
Kansas, KAN. STAT. ANN. § 21-4203
Kentucky, KY. REV. STAT. ANN. § 527.110
Louisiana, LA. REV. STAT. ANN. § 14:91
Maine, ME. REV. STAT. ANN. tit. 17-A, § 554-B
Maryland, MD. CODE ANN., PUB. SAFETY § 5-134
Massachusetts, MASS. GEN. LAWS ANN. ch. 140, §§ 129C – 130
Michigan, MICH. COMP. LAWS ANN. § 750.223
Minnesota, MINN. STAT. ANN. § 609.66
Nebraska, NEB. REV. STAT. § 28-1204.01
Nevada, NEV. REV. STAT. 202.310
New Hampshire, N.H. REV. STAT. ANN. § 159:12
New York, N.Y. PENAL LAW § 265.16
North Carolina, N.C. GEN. STAT. § 14-315
Ohio, OHIO REV. CODE ANN. § 2923.21

[9] Connecticut, CONN. GEN. STAT. ANN. § 29-34; Delaware, DEL. CODE ANN. tit. 24, § 903; District of Columbia, D.C. CODE ANN. § 22-4507; Hawaii, HAW. REV. STAT. ANN. § 134-2; Iowa, IOWA CODE ANN. § 724.22; Maryland, MD. CODE ANN., PUB. SAFETY § 5-134; Massachusetts, MASS. GEN. LAWS ANN. ch. 140, § 130; Ohio, OHIO REV. CODE ANN. § 2923.21; and South Carolina, S.C. CODE ANN. § 16-23-30.

[10] New York, N.Y. PENAL LAW § 265.16.

Oklahoma, OKLA. STAT. ANN. tit. 21, § 1273
Oregon, OR. REV. STAT. § 166.470
Pennsylvania, 18 PA. CONS. STAT. ANN. § 6302
South Carolina, S.C. CODE ANN. § 16-23-30
Tennessee, TENN. CODE ANN. § 39-17-1303
Texas, TEX. PENAL CODE ANN. § 46.06
Utah, UTAH CODE ANN. § 76-10-509.5
Virginia, VA. CODE ANN. § 18.2-309
Wisconsin, WIS. STAT. ANN. § 948.60

32 states either absolutely prohibit the possession of certain firearms by youth under the age of 18, or only allow possession with parental consent and/or supervision.[11] Three states (Maryland, New Jersey, and Washington) restrict the possession of certain firearms by youth under the age of 21, and New Mexico prohibits the possession of certain firearms by youth under the age of 19.[12]

Arkansas, ARK. CODE ANN. § 5-73-119
California, CAL. PENAL CODE § 12101
Colorado, COLO. REV. STAT. ANN. § 18-12-108.5
Delaware, DEL. CODE ANN. tit. 11, § 1448
Florida, FLA. STAT. ANN. § 790.22
Georgia, GA. CODE ANN. § 16-11-132
Idaho, IDAHO CODE § 18-3302F
Illinois, 720 ILL. COMP. STAT. ANN. 5/24-3.1
Indiana, IND. CODE ANN. § 35-47-10-5
Iowa, IOWA CODE ANN. § 724.22
Kansas, KAN. STAT. ANN. § 21-4204a
Maryland, MD. CODE ANN., PUB. SAFETY § 5-133
Massachusetts, MASS. GEN. LAWS ANN. ch. 140, § 129B
Michigan, MICH. COMP. LAWS ANN. § 750.234f
Mississippi, MISS. CODE ANN. § 97-37-14
Nebraska, NEB. REV. STAT. § 28-1204

[11]Most statutes enumerate supervised firearm activities, such as hunting and marksmanship, that are excluded from the prohibition.

[12]Maryland, MD. CODE ANN., PUB. SAFETY § 5-133; New Jersey, N.J. STAT. ANN. § 2C:58-6.1; New Mexico, N.M. STAT. ANN. § 30-7-2.2; and Washington, WASH. REV. CODE ANN. §§ 9.41.040, .41.240.

Nevada, NEV. REV. STAT. 202.300
New Jersey, N.J. STAT. ANN. § 2C:58-6.1
New Mexico, N.M. STAT. ANN. § 30-7-2.2
North Carolina, N.C. GEN. STAT. § 14-269.7
North Dakota, N.D. CENT. CODE § 62.1-02-01
Oklahoma, OKLA. STAT. ANN. tit. 21, § 1273
Oregon, OR. REV. STAT. § 166.250
Pennsylvania, 18 PA. CONS. STAT. ANN. § 6110.1
Rhode Island, R.I. GEN. LAWS § 11-47-33
South Dakota, S.D. CODIFIED LAWS § 23-7-44
Tennessee, TENN. CODE ANN. § 39-17-1319
Utah, UTAH CODE ANN. §§ 76-10-509, -509.4
Virginia, VA. CODE ANN. § 18.2-308.7
Washington, WASH. REV. CODE ANN. §§ 9.41.040, .41.240
West Virginia, W. VA. CODE § 61-7-8
Wisconsin, WIS. STAT. ANN. § 948.60

Foreign Travel

Youth under the age of 18 cannot obtain a passport for foreign travel if the custodial parent objects. 22 C.F.R. § 51.27.

Gambling

In each of the 48 jurisdictions where gambling is legal, youth under the age of 18 are prohibited from participating in certain forms of gambling.[13]

[13]Gambling is outlawed in three states (Hawaii, North Carolina, and Utah). Hawaii, HAW. REV. STAT. § 712-1223; North Carolina, N.C. GEN. STAT. §§ 14-289 to -292, -309.5, *et. seq.* (narrow exception for licensed bingo games operated by non-profit organizations with maximum prize amount of $500); and Utah, UTAH CONST. art. 6, § 27.

Lotteries

41 states prohibit youth under the age of 18 from purchasing lottery tickets.[14] Three states (Arizona, Iowa, and Louisiana) prohibit youth under the age of 21 from purchasing lottery tickets.[15]

Arizona, ARIZ. REV. STAT. ANN. § 5-515
California, CAL. GOV'T CODE § 8880.52
Colorado, COLO. REV. STAT. ANN. § 24-35-214
Connecticut, CONN. GEN. STAT. § 12-813
Delaware, DEL. CONST. art. II, § 17; DEL. CODE ANN. tit 29, § 4810
Florida, FLA. STAT. ANN. § 24.1055
Georgia, GA. CODE ANN. § 50-27-26
Idaho, IDAHO CODE § 67-7415
Illinois, 20 ILL. COMP. STAT. ANN. 1605/15
Indiana, IND. CODE ANN. § 4-30-11-3
Iowa, IOWA CODE ANN. § 99G.30
Kansas, KAN. STAT. ANN. § 74-8718
Kentucky, KY. REV. STAT. ANN. § 154A.990
Louisiana, LA. REV. STAT. ANN. § 47:9025
Maine, ME. REV. STAT. ANN. tit. 8, § 380
Maryland, MD. CODE ANN., STATE GOV'T § 9-124
Massachusetts, MASS. GEN. LAWS ANN. ch. 10, § 29
Michigan, MICH. COMP. LAWS ANN. § 432.29
Minnesota, MINN. STAT. ANN. § 349A.12
Missouri, MO. ANN. STAT. § 313.280
Montana, MONT. CODE ANN. § 23-7-110
Nebraska, NEB. REV. STAT. §§ 9-430, -646
New Hampshire, N.H. REV. STAT. ANN. § 287-F:8

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[14] Lotteries are illegal in five states (Alabama, Arkansas, Hawaii, North Carolina, and Utah) and the District of Columbia, and Nevada only allows charitable lotteries. Alabama, ALA. CONST. art. IV, § 65; Arkansas, ARK. CONST. art. XIX, § 14A; District of Columbia, D.C. CODE ANN. § 22-1708; Hawaii, HAW. REV. STAT. § 712-1223; Nevada, NEV. REV. STAT. 462.250; North Carolina, N.C. GEN. STAT. §§ 14-289 to -291; and Utah, UTAH CONST. art. VI, § 27. Pending legislation in Mississippi would establish a lottery and prohibit youth under the age of 18 from purchasing tickets. Mississippi, H.B. 1064, 2004 Reg. Sess. (Miss. 2004).

[15] Arizona, ARIZ. REV. STAT. ANN. § 5-515; Iowa, IOWA CODE ANN. § 99G.30; and Louisiana, LA. REV. STAT. ANN. § 47:9025.

New Jersey, N.J. STAT. ANN. § 5:9-15
New Mexico, N.M. STAT. ANN. § 6-24-15
New York, N.Y. TAX LAW § 1610
North Dakota, N.D. CENT. CODE § 53-12-24
Ohio, OHIO REV. CODE ANN. § 3770.08
Oklahoma, OKLA. STAT. ANN. tit. 3A, § 723
Oregon, OR. REV. STAT. § 462.190
Pennsylvania, PA. STAT. ANN. tit. 72, § 3761-309
Rhode Island, R.I. GEN. LAWS § 42-61-9
South Carolina, S.C. CODE ANN. § 59-150-210
South Dakota, S.D. CODIFIED LAWS § 42-7A-32
Tennessee, TENN. CODE ANN. §§ 39-17-602, -603
Texas, TEX. GOV'T CODE ANN. § 466.3051
Vermont, VT. STAT. ANN. tit. 31, §§ 661, 674
Virginia, VA. CODE ANN. § 58.1-4015
Washington, WASH. REV. CODE § 67.70.120
West Virginia, W. VA. CODE § 29-22-11
Wisconsin, WIS. STAT. § 565.17

Bingo

30 states and the District of Columbia either absolutely prohibit youth under the age of 18 from participating in bingo games, or only allow youth under the age of 18 to participate if a parent consents.[16] Two states (Alabama and Alaska) prohibit youth under the age of 19 from participating in bingo games.[17] Nevada prohibits youth under the age of 21 from participating in bingo games.[18]

Alabama, ALA. CONST. amends. 386, 674
Alaska, ALASKA STAT. § 05.15.180

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[16] Bingo is illegal or unconstitutional in three states (Hawaii, North Carolina, and Utah). Hawaii, HAW. REV. STAT. § 712-1223; North Carolina, N.C. GEN. STAT. §§ 14-292,-309.5 to .12 (narrow exception for licensed bingo games operated by non-profit organizations with maximum prize amount of $500); and Utah, UTAH CONST. art. 6, § 27.

[17] Alabama, ALA. CONST. amends. 386, 387 (applies to named counties only) and Alaska, ALASKA STAT. § 05.15.180.

[18] Nevada, NEV. REV. STAT. 463.350.

California, CAL. PENAL CODE § 326.5
Colorado, COLO. REV. STAT. ANN. §§ 12-9-102, -107
District of Columbia, D.C. CODE ANN. § 3-1334
Florida, FLA. STAT. ANN. § 849.0931
Georgia, GA. CODE ANN. § 16-12-58
Idaho, IDAHO CODE § 67-7707
Illinois, 230 ILL. COMP. STAT. ANN. 25/2
Indiana, IND. CODE § 4-32-9-34
Kansas, KAN. STAT. ANN. § 79-4706
Kentucky, KY. REV. STAT. ANN. § 238.545
Minnesota, MINN. STAT. ANN. § 349.2127
Mississippi, MISS. CODE ANN. § 97-33-67
Montana, MONT. CODE ANN. § 23-5-158
Nebraska, NEB. REV. STAT. § 9-241.08
Nevada, NEV. REV. STAT. 463.350
New Hampshire, N.H. REV. STAT. ANN. § 287-E:7
New Jersey, N.J. STAT. ANN. § 5:8-32
New Mexico, N.M. STAT. ANN. § 30-19-7.2
New York, N.Y. GEN. MUN. LAW § 486
North Dakota, N.D. CENT. CODE § 53-06.1-03
Ohio, OHIO REV. CODE ANN. § 2915.09
Oklahoma, OKLA. STAT. ANN. tit. 3A, §§ 402, 418
Pennsylvania, PA. STAT. ANN. tit 10, § 305
Rhode Island, R.I. GEN. LAWS § 11-19-32
Tennessee, TENN. CODE ANN. § 3-17-101
Texas, TEX. OCC. CODE ANN. § 2001.418
Virginia, VA. CODE ANN. § 18.2-340.19
West Virginia, W. VA. CODE § 47-20-4
Wisconsin, WIS STAT. ANN. § 563.51

Pari-mutuel Betting

39 states prohibit youth under the age of 18 from engaging in pari-mutuel betting.[19] Six states (Arizona, Iowa, Mississippi, Nevada, Texas, and Washington) prohibit youth under the age of 21 from placing pari-mutuel bets.[20] Two states (Alabama and Nebraska) prohibit youth under the age of 19 from placing pari-mutuel bets.[21]

Alabama, ALA. CODE § 11-65-44
Arizona, ARIZ. REV. STAT. ANN. § 5-112
Arkansas, ARK. CODE ANN. § 23-110-405
California, CAL. BUS. & PROF. CODE § 19604
Colorado, COLO. REV. STAT. ANN. § 12-60-601
Connecticut, CONN. GEN. STAT. ANN. § 12-576
Florida, FLA. STAT. ANN. § 550.0425
Idaho, IDAHO CODE § 54-2512
Illinois, 230 ILL. COMP. STAT. ANN. 5/26
Indiana, IND. CODE § 4-31-7-2
Iowa, IOWA CODE ANN. § 99D.11
Kansas, KAN. STAT. ANN. § 74-8810
Louisiana, LA. REV. STAT. ANN. § 4:157
Maine, ME. REV. STAT. ANN. tit. 8 § 278
Massachusetts, MASS. GEN. LAWS ANN. ch. 128A, § 10
Michigan, MICH. COMP. LAWS ANN. § 431.317
Minnesota, MINN. STAT. ANN. § 240.25
Mississippi, MISS. CODE ANN. § 75-76-155
Missouri, MO. ANN. STAT. § 313.670
Montana, MONT. CODE ANN. § 23-4-301
Nebraska, NEB. REV. STAT. § 2-1207
Nevada, NEV. REV. STAT. 463.350
New Hampshire, N.H. REV. STAT. ANN. § 284:33
New Jersey, N.J. STAT. ANN. § 5:5-65
New York, N.Y. RAC. PARI-MUT. WAG. & BREED. LAW § 104
Ohio, OHIO REV. CODE ANN. § 3769.08
Oklahoma, OKLA. STAT. tit. 3A, § 208.4
Oregon, OR. REV. STAT. § 462.190
Pennsylvania, 4 PA. CONST. STAT. ANN. § 325.228

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[19] Pari-mutuel betting is illegal in four states (Georgia, Hawaii, North Carolina, and Utah) and the District of Columbia. Georgia, GA. CONST. art. 1, § 2, ¶VIII; District of Columbia, D.C. CODE ANN. § 22-1708; Hawaii, HAW. REV. STAT. § 712-1223; North Carolina, N.C. GEN. STAT. § 14-292; and Utah, UTAH CONST. art. 6, § 27.

[20] Arizona, ARIZ. REV. STAT. ANN. § 5-112; Iowa, IOWA CODE ANN. § 99D.11; Mississippi, MISS. CODE ANN. § 75-76-155; Nevada, NEV. REV. STAT. 463.350; Texas, TEX. REV. CIV. STAT. ANN. art. 179e; and Washington, WASH. REV. CODE ANN. § 67.16.350.

[21] Alabama, ALA. CODE § 11-65-44; and Nebraska, NEB. REV. STAT. § 2-1207.

Rhode Island, R.I. GEN. LAWS § 41-11-4
South Dakota, S.D. CODIFIED LAWS § 42-7-76
Tennessee, TENN. CODE ANN. § 4-36-310
Texas, TEX. REV. CIV. STAT. ANN. art. 179e
Vermont, VT. STAT. ANN. tit. 31, § 613
Virginia, VA. CODE ANN. § 59.1-403
Washington, WASH. REV. CODE ANN. § 67.16.350
West Virginia, W. VA. CODE § 29-22-11
Wisconsin, WIS. STAT. ANN. § 562.06
Wyoming, WYO. STAT. ANN. § 11-25-109

Jury Duty

All 50 states and the District of Columbia prohibit youth under the age of 18 from serving on juries. (Alabama and Nebraska prohibit youth under the age of 19 from serving on a jury; Mississippi and Missouri prohibit jury service for youth under the age of 21.)

Alabama, ALA. CODE § 12-16-60
Alaska, ALASKA STAT. § 09.20.010
Arizona, ARIZ. REV. STAT. ANN. § 21-301
Arkansas, ARK. CODE ANN. § 16-31-101
California, CAL. CIV. PROC. CODE § 203(a)(2); CAL. PENAL CODE § 893
Colorado, COLO. REV. STAT. ANN. § 13-71-105
Connecticut, CONN. GEN. STAT. § 51-217
Delaware, DEL. CODE. ANN. tit. 10, § 4509
District of Columbia, D.C. CODE ANN. § 11-1906
Florida, FLA. STAT. ANN. § 40.01
Georgia, GA. CODE ANN. § 15-12-163
Hawaii, HAW. REV. STAT. § 612-4
Idaho, IDAHO CODE § 2-209
Illinois, 705 ILL. COMP. STAT. ANN. 305/2
Indiana, IND. CODE § 33-4-5-7
Iowa, IOWA CODE ANN. § 607A.4
Kansas, KAN. STAT. ANN. § 43-156
Kentucky, KY. REV. STAT. ANN. § 29A.080
Louisiana, LA. CODE CRIM. PROC. ANN. art. 401
Maine, ME. REV. STAT. ANN. tit. 14, § 1211
Maryland, MD. CODE. ANN., CTS. & JUD. PROC. § 8-104

Massachusetts, MASS. GEN. LAWS ANN. ch. 234, § 1
Michigan, MICH. COMP. LAWS ANN. § 600.1307a
Minnesota, MINN. GEN. R. PRAC. 808
Mississippi, MISS. CODE ANN. § 13-5-1
Missouri, MO. ANN. STAT. § 494.425
Montana, MONT. CODE ANN. § 3-15-301
Nebraska, NEB. REV. STAT. § 25-1601
Nevada, NEV. REV. STAT. 6.010
New Hampshire, N.H. REV. STAT. ANN. § 500-A:7-a
New Jersey, N.J. STAT. ANN. § 9:17B-1
New Mexico, N.M. STAT. ANN. § 38-5-1
New York, N.Y. JUD. LAW § 510
North Carolina, N.C. GEN. STAT. § 9-3
North Dakota, N.D. CENT. CODE § 27-09.1-08
Ohio, OHIO REV. CODE ANN. § 2313.42
Oklahoma, OKLA. STAT. ANN. tit. 38, § 28
Oregon, OR. REV. STAT. § 10.030
Pennsylvania, 42 PA. CONST. STAT. ANN. § 4502
Rhode Island, R.I. GEN. LAWS § 9-9-1
South Carolina, S.C. CODE ANN. § 14-7-130
South Dakota, S.D. CODIFIED LAWS § 16-13-10
Tennessee, TENN. CODE ANN. § 22-1-101
Texas, TEX. GOV'T CODE ANN. § 62.102
Utah, UTAH CODE ANN. § 78-46-7
Vermont, VT. STAT. ANN. tit. 4, § 962
Virginia, VA. CODE ANN. § 8.01-337
Washington, WASH. REV. CODE ANN. § 2.36.070
West Virginia, W. VA. CODE § 52-1-8
Wisconsin, WIS. STAT. ANN. § 756.02
Wyoming, WYO. STAT. ANN. § 1-11-101

Labor

22 states and the District of Columbia limit the number of hours per day or hours per week that youth under the age of 18 may work in non-farm employment.[22]

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[22]U.S. Dept. of Labor, *Selected State Child Labor Standards Affecting Minors Under 18 in Non-farm Employment as of January 1, 2003, at* http://www.dol.gov/esa/programs/whd/state/nonfarm.htm (2003).

23 states and the District of Columbia restrict nightwork for youth under age 18.[23]

Marriage

36 states and the District of Columbia either absolutely prohibit youth under the age of 18 from marrying, or only allow marriage with parental consent.[24]

Arizona, ARIZ. REV. STAT. § 25-102
Arkansas, ARK. CODE ANN. § 9-11-102
California, CAL. FAM. CODE § 301
Colorado, COLO. REV. STAT. § 14-2-106
Connecticut, CONN. GEN. STAT. § 46b-30
Delaware, DEL. CODE ANN. tit. 13, § 123
District of Columbia, D.C. CODE ANN. § 46-411
Florida, FLA. STAT. ANN. § 741.0405
Hawaii, HAW. REV. STAT. § 572-2
Idaho, IDAHO CODE § 32-202
Indiana, IND. CODE § 31-11-1-4
Kentucky, KY. REV. STAT. ANN. § 402.020
Maine, ME. REV. STAT. ANN. tit. 19-A, § 652
Maryland, MD. CODE. ANN., FAM. LAW § 2-301
Massachusetts, MASS. GEN. LAWS ch. 207, §§ 7, 24, 25
Missouri, MO. REV. STAT. § 451.090
Montana, MONT. CODE ANN. § 40-1-213

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[23] *Id.*

[24] Five of the 36 states (Delaware, Florida, Kentucky, Maryland, and Oklahoma) and the District of Columbia have an exception to this prohibition for youth who were either previously married or are pregnant. Delaware, DEL. CODE ANN. tit. 13, § 123; District of Columbia, D.C. CODE ANN. § 46-411; Florida, FLA. STAT. ANN. § 741.0405; Kentucky, KY. REV. STAT. ANN. § 402.020; Maryland, MD. CODE. ANN., FAM. LAW § 2-301; and Oklahoma, OKLA. STAT. tit. 43, § 3. Virginia makes an exception for emancipated youth. VA. CODE ANN. § 20-49. Seven additional states (Alaska, Illinois, Iowa, Kansas, Louisiana, Minnesota and Texas) require youth under age 18 to obtain parental consent, but allow for judicial waivers of the consent requirement. Alaska, ALASKA STAT. § 25.05.171; Illinois, 750 ILL. COMP. STAT. 5/203; Iowa, IOWA CODE § 595.2; Kansas, KAN. STAT. ANN. § 23-106; Louisiana, LA. CHILDREN'S CODE ANN. art. 1545; Minnesota, MINN. STAT. § 517.02; and Texas, TEX. FAM. CODE ANN. § 2.003.

Nebraska, NEB. REV. STAT. § 42-105
Nevada, NEV. REV. STAT. 122.020
New Hampshire, N.H. REV. STAT. ANN. § 457:5
New Jersey, N.J. STAT. ANN. § 37:1-6
New Mexico, N.M. STAT. ANN. § 40-1-5
New York, N.Y. DOM. REL. LAW § 7
North Carolina, N.C. GEN. STAT. §§ 51-2, -2.1
North Dakota, N.D. CENT. CODE § 14-03-02
Ohio, OHIO REV. CODE ANN. § 3101.01.
Oklahoma, OKLA. STAT. tit. 43, § 3
Pennsylvania, 23 PA. CONS. STAT. § 1304
Rhode Island, R.I. GEN. LAWS § 15-2-11
South Dakota, S.D. CODIFIED LAWS § 25-1-9
Tennessee, TENN. CODE ANN. § 36-3-106
Utah, UTAH CODE ANN. § 30-1-9
Vermont, VT. STAT. ANN. tit. 18, § 5142
Virginia, VA. CODE ANN. § 20-49
West Virginia, W. VA. CODE § 48-2-301
Wisconsin, WIS. STAT. § 765.02
Washington, WASH. REV. CODE § 26.04.010

Military Service

Federal law prohibits youth under the age of 18 from enlisting in the Regular Army, Regular Marine Corps, Regular Air Force, Regular Navy, or Regular Coast Guard without the written consent of the youth's parent or guardian. 10 U.S.C.A. § 505. Youth under the age of 18 cannot be drafted. 50 APP. U.S.C.A. § 454.

Pawning Property

In 37 states, youth under the age of 18 are prohibited from engaging in transactions with pawnbrokers. (Alabama prohibits youth under the age of 19 from engaging in transactions with pawnbrokers.)

Alabama, ALA. CODE § 5-19A-8
Arizona, ARIZ. REV. STAT. § 44-1624
Arkansas, ARK. CODE ANN. § 18-27-204
California, CAL. FIN. CODE § 21207
Colorado, COLO. REV. STAT. ANN. § 12-56-104

Connecticut, CONN. GEN. STAT. ANN. § 21-47
Delaware, DEL. CODE ANN. tit. 24, § 2312
Florida, FLA. STAT. ANN. § 539.001
Georgia, GA. CODE ANN. § 44-12-137
Hawaii, HAW. REV. STAT. § 445-134.13
Illinois, 205 ILL. COMP. STAT. 510/8
Indiana, IND. CODE § 28-7-5-36
Kansas, KAN. STAT. ANN. § 16-717
Kentucky, KY. REV. STAT. ANN. § 226.030
Louisiana, LA. REV. STAT. ANN. § 37:1802
Maryland, MD. CODE ANN., BUS. REG. § 12-213
Michigan, MICH. COMP. LAWS ANN. § 446.214
Minnesota, MINN. STAT. ANN. § 325J.08
Mississippi, MISS. CODE ANN. § 75-67-135
Missouri, MO. ANN. STAT. § 367.040
Montana, MONT. CODE ANN. § 45-5-623
Nebraska, NEB. REV. STAT. § 69-210
Nevada, NEV. REV. STAT. 646.060
New Hampshire, N.H. REV. STAT. ANN. § 398:2
New Mexico, N.M. STAT. ANN. § 56-12-14
New York, N.Y. GEN. BUS. LAW § 47-a
North Carolina, N.C. GEN. STAT. § 91A-10
Ohio, OHIO REV. CODE ANN. § 4727.10
Oklahoma, OKLA. STAT. ANN. tit. 59, § 1511
Oregon, OR. REV. STAT. § 726.270
Pennsylvania, 63 PA. CONST. STAT. § 281-29
Rhode Island, R.I. GEN. LAWS § 19-26-12
Tennessee, TENN. CODE ANN. § 45-6-212
Texas, TEX. FIN. CODE ANN. § 371.176
Vermont, VT. STAT. ANN. tit. 9, § 3870
Washington, WASH. REV. CODE ANN. § 19.60.066
Wisconsin, WIS. STAT. ANN. § 134.71

Pornography

47 states either absolutely prohibit the sale or delivery of material that is obscene or harmful to minors to youth under the age of 18, or only allow sale or delivery if a youth's parent consents. (Alabama prohibits the delivery of material harmful to minors to youth under the age of 19.)

Alabama, ALA. CODE § 13A-12-200.5
Arizona, ARIZ. REV. STAT. § 13-3506
Arkansas, ARK. CODE ANN. § 5-68-502
California, CAL. PENAL CODE § 313.1
Colorado, COLO. REV. STAT. § 18-7-502
Delaware, DEL. CODE ANN. tit. 11, § 1365
Florida, FLA. STAT. ANN. § 847.012
Georgia, GA. CODE ANN. § 16-12-103
Hawaii, HAW. REV. STAT. § 712-1215
Idaho, IDAHO CODE § 18-1515
Illinois, 720 ILL. COMP. STAT. 5/11-21
Indiana, IND. CODE ANN. § 35-49-3-3
Iowa, IOWA CODE § 728.2
Kansas, KAN. STAT. ANN. § 21-4301a
Kentucky, KY. REV. STAT. ANN. § 531.030
Maine, ME. REV. STAT. ANN. tit. 17, § 2911
Maryland, MD. CODE ANN., CRIM. § 11-203
Massachusetts, MASS. ANN. LAWS ch. 272, § 28
Michigan, MICH. COMP. LAWS ANN. § 750.142
Minnesota, MINN. STAT. ANN. § 617.293
Mississippi, MISS. CODE ANN. § 97-5-27
Missouri, MO. REV. STAT. § 573.040
Montana, MONT. CODE ANN. § 45-8-201
Nebraska, NEB. REV. STAT. § 28-808
Nevada, NEV. REV. STAT. ANN. 201.265
New Hampshire, N.H. REV. STAT. ANN. § 571-B:2
New Jersey, N.J. STAT. ANN. § 2C:34-3
New Mexico, N.M. STAT. ANN. § 30-37-2
New York, N.Y. PENAL LAW § 235.21
North Carolina, N.C. GEN. STAT. § 19-13
North Dakota, N.D. CENT. CODE § 12.1-27.1-03
Ohio, OHIO REV. CODE ANN. § 2907.31
Oklahoma, OKLA. STAT. ANN. tit. 21, § 1040.76
Oregon, OR. REV. STAT. § 167.065
Pennsylvania, 18 PA. CONS. STAT. ANN. § 5903
Rhode Island, R.I. GEN. LAWS § 11-31-10
South Carolina, S.C. CODE ANN. § 16-15-385
South Dakota, S.D. CODIFIED LAWS § 22-24-28
Tennessee, TENN. CODE ANN. § 39-17-911
Texas, TEX. PENAL CODE ANN. § 43.24

Utah, UTAH CODE ANN. § 76-10-1206
Vermont, VT. STAT. ANN. tit. 13, § 2802
Virginia, VA. CODE ANN. § 18.2-391
Washington, WASH. REV. CODE § 9.68.060
West Virginia, W. VA. CODE § 61-8A-2
Wisconsin, WIS. STAT. ANN. § 944.21
Wyoming, WYO. STAT. ANN. § 6-4-302[25]

Tanning

16 states prohibit youth under the age of 18 from using artificial sun tanning facilities without written parental consent.[26]

California, CAL. BUS. & PROF. CODE § 22706
Florida, FLA. STAT. ANN. § 381.89
Georgia, GA. CODE ANN. § 31-38-8
Illinois, ILL. ADMIN. CODE tit. 77, § 795.190
Indiana, IND. CODE ANN. § 25-8-15.4-16

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[25]Disseminating obscene material to any person is a criminal offense; however, the penalty is more severe if the obscene material is disseminated to a youth under the age of 18.

[26]Of the 16 states that prohibit youth under age of 18 from tanning without parental consent, 15 states passed their tanning legislation since *Stanford* was argued. Florida, FLA. STAT. ANN. § 381.89, effective May 28, 2004; Georgia, GA. CODE ANN. § 31-38-8, effective 1991; Illinois, ILL. ADMIN. CODE tit. 77, § 795.190, effective December 7, 1992; Indiana, IND. CODE ANN. § 25-8-15.4-16, effective July 1, 1995; Louisiana, LA. REV. STAT. ANN. § 40:2714, effective July 19, 1990; Maine, CODE ME. R. 10-144 Ch. 223, § 12, effective March 1, 1991; Massachusetts, MASS. GEN. LAWS ANN. ch. 111, § 211, effective December 29, 1990; Michigan, MICH. COMP. LAWS ANN. § 333.13407, effective September 1, 1996; North Carolina, N.C. ADMIN. CODE tit. 15A, r. 11.1418, effective June 1, 1989; Ohio, OHIO REV. CODE ANN. § 4713.08, effective April 7, 2003; Oregon, OR. ADMIN. R. 333-119-0090, effective October 1, 1991; Rhode Island, R.I. CODE R. 14 000 023, effective January 18, 1999; South Carolina, 61 S.C. CODE ANN. REGS. 106, effective March 27, 1992; Tennessee, TENN. CODE ANN. § 68-117-104, effective April 10, 1990; and Texas, TEX. HEALTH & SAFETY CODE ANN. § 145.008, effective September 1, 1991. At least two additional states (California and Pennsylvania) have proposed age-based tanning legislation this year. California, A.B. 2193, 2004 Leg., Reg. Sess. (Ca. 2004) (would prohibit youth under age 18 from tanning except on prescription by a physician); Pennsylvania, H.B. 109, 2004 Leg., Reg. Sess. (Pa. 2004) (would add requirement that youth under age 18 obtain parental consent for tanning).

Louisiana, LA. REV. STAT. ANN. § 40:2714
Maine, CODE ME. R. 10-144 Ch. 223, § 12
Massachusetts, MASS. GEN. LAWS ANN. ch. 111, § 211
Michigan, MICH. COMP. LAWS ANN. § 333.13407
North Carolina, N.C. ADMIN. CODE tit. 15A, r. 11.1418
Ohio, OHIO REV. CODE ANN. § 4713.08
Oregon, OR. ADMIN. R. 333-119-0090
Rhode Island, R.I. CODE R. 14 000 023
South Carolina, 61 S.C. CODE ANN. REGS. 106
Tennessee, TENN. CODE ANN. § 68-117-104
Texas, TEX. HEALTH & SAFETY CODE ANN. § 145.008

Tattoos

42 states either absolutely prohibit youth under the age of 18 from obtaining a tattoo, or only allow a youth to obtain a tattoo if a parent consents. (Illinois prohibits tattooing of youth under the age of 21.)[27]

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[27]Of the 42 states that have age-based tattoo laws, at least 24 states passed their age-based tattoo restrictions since 1989, with at least seven states passing age-based tattoo restrictions in the past five years (1999-2004). Alabama, ALA. ADMIN. CODE r. 420-3-23-.03, effective April 19, 2001; Alaska, ALASKA STAT. § 08.13.217, effective September 1, 2000; Arizona, ARIZ. REV. STAT. § 13-3721, enacted April 22, 1996; Arkansas, ARK. CODE ANN. § 20-27-1502, effective August 13, 2001; Connecticut, CON. GEN. STAT. ANN. § 19a-92a, effective May 23, 1994; Indiana, IND. CODE § 35-42-2-7, approved May 6, 1997; Iowa, IOWA ADMIN. CODE r. 641-22.3, effective January 1, 1990; Michigan, MICH. COMP. LAWS ANN. § 333.13102, effective September 1, 1996; Minnesota, MINN. STAT. ANN. § 609.2246, effective August 1, 1996; Mississippi, MISS. CODE ANN. § 73-61-1, effective July 1, 1994; Missouri, MO. ANN. STAT. § 324.520, effective October 13, 1999; Montana, MONT. ADMIN R. 37.112.140, effective April 17, 1998; New Hampshire, N.H. REV. STAT. ANN. § 314-A:8, effective January 1, 2003; New Jersey, N.J. STAT. ANN.§ 2C:40-21, effective November, 2001; Ohio, OHIO REV. CODE ANN. § 3730.06, effective October 14, 1997; South Dakota, S.D. ADMIN. R. 44:12:01:13, effective November 3, 1992; Tennessee, TENN. CODE ANN. § 62-38-207 effective October 1, 1996; Texas, TEX. HEALTH & SAFETY CODE ANN. § 146.012, effective September 1, 1993; Utah, UTAH CODE ANN.§ 76-10-2201, effective May 4, 1998; Vermont, VT. STAT. ANN. tit. 26, § 4102, added by statute, 1995; Virginia, VA. CODE ANN. § 18.2-371.3, enacted March 20, 1997; Washington, WASH. REV. CODE ANN. § 26.28.085, effective July 23, 1995; West Virginia, W. VA. CODE § 16-38-3, effective July 1, 2001; and Wisconsin, WIS. STAT. § 948.70, effective January 3, 1992.

Alabama, ALA. ADMIN. CODE r. 420-3-23-.03
Alaska, ALASKA STAT. § 08.13.217
Arizona, ARIZ. REV. STAT. § 13-3721
Arkansas, ARK. CODE ANN. § 20-27-1502
California, CAL. PENAL CODE § 653
Connecticut, CON. GEN. STAT. ANN. § 19a-92a
Delaware, DEL. CODE ANN. tit. 11, § 1114
Florida, FLA. STAT. ANN. § 877.04
Georgia, GA. CODE ANN. § 16-5-71
Hawaii, HAW. ADMIN. CODE § 11-17-7
Iowa, IOWA ADMIN. CODE r. 641-22.3
Illinois, 720 ILL. COMP. STAT. 5/12-10
Indiana, IND. CODE § 35-42-2-7
Kansas, KAN. STAT. ANN. § 65-1953
Kentucky, 902 KY. ADMIN. REGS. 45:065E
Louisiana, LA. REV. STAT. ANN. § 14:93.2
Maine, CODE ME. R. 10-144 ch. 210, § 4
Maryland, MD. REGS. CODE tit. 10, § 10.06.01.06
Massachusetts, MASS. GEN. LAWS ANN. ch. 265, § 34
Michigan, MICH. COMP. LAWS ANN. § 333.13102
Minnesota, MINN. STAT. ANN. § 609.2246
Mississippi, MISS. CODE ANN. § 73-61-1
Missouri, MO. ANN. STAT. § 324.520
Montana, MONT. ADMIN R. 37.112.140
New Hampshire, N.H. REV. STAT. ANN. § 314-A:8
New Jersey, N.J. STAT. ANN. § 2C:40-21
New York, N.Y. PENAL LAW § 260.21
North Carolina, N.C. GEN. STAT. § 14-400
Ohio, OHIO REV. CODE ANN. § 3730.06
Oregon, OR. ADMIN. R. 331-575-0010
Pennsylvania, 18 PA. CONS. STAT. ANN. § 6311
Rhode Island, R.I. GEN. LAWS § 11-9-15
South Dakota, S.D. ADMIN. R. 44:12:01:13
Tennessee, TENN. CODE ANN. § 62-38-207
Texas, TEX. HEALTH & SAFETY CODE ANN. § 146.012
Utah, UTAH CODE ANN. § 76-10-2201
Vermont, VT. STAT. ANN. tit. 26, § 4102
Virginia, VA. CODE ANN. § 18.2-371.3
Washington, WASH. REV. CODE ANN. § 26.28.085
West Virginia, W. VA. CODE § 16-38-3
Wisconsin, WIS. STAT. § 948.70

Wyoming, WYO. STAT. ANN. § 14-3-107

Voting

In all 50 states and the District of Columbia, youth under the age of 18 are prohibited from voting.

Alabama, ALA. CONST. amend. 223
Alaska, ALASKA CONST. art. V, § 1
Arizona, ARIZ. REV. STAT. §16-121
Arkansas, ARK. CONST. amend. 51, § 6
California, CAL. CONST. art. II, § 2
Colorado, COLO. REV. STAT. § 1-2-101
Connecticut, CONN. GEN. STAT. ANN. § 9-12
Delaware, DEL. CODE ANN. tit. 15, § 1701
District of Columbia, D.C. CODE ANN. § 1-1001.02
Florida, FLA. STAT. ANN. § 97.041
Georgia, GA. CONST. art. II, § 1, ¶ II
Hawaii, HAW. REV. STAT. § 11-12
Idaho, IDAHO CODE § 34-402
Illinois, 10 ILL. COMP. STAT. 5/3-1
Indiana, IND. CODE ANN. § 3-7-13-1
Iowa, IOWA CODE § 48A.5
Kansas, KAN. CONST. art. V, § 1
Kentucky, KY. REV. STAT. ANN. § 145
Louisiana, LA. CONST. art. I, § 10; LA. REV. STAT. ANN. § 18:101
Maine, ME. REV. STAT. ANN. tit. 21-A, § 111
Maryland, MD. CODE ANN. ELEC. art. 33, § 3-4
Massachusetts, MASS. GEN. LAWS ANN. ch. 51, § 1
Michigan, MICH. COMP. LAWS § 168.492
Minnesota, MINN. STAT. § 201.014
Mississippi, MISS. CONST. art. XII, § 241
Missouri, MO. CONST. art. VIII, § 2
Montana, MONT. CONST. art. IV, § 2; MONT. CODE ANN. § 13-1-111
Nebraska, NEB. CONST. art. VI, § 1
Nevada, NEV. REV. STAT. 293.485
New Hampshire, N.H. CONST. pt. 1, art. 11
New Jersey, N.J. CONST. art. II, § 1, ¶ 3
New Mexico, N.M. CONST. Art. VII, § 1
New York, N.Y. ELEC. LAW § 5-102
North Carolina, N.C. GEN. STAT. § 163-55

North Dakota, N.D. CONST. art. II, § 1
Ohio, OHIO REV. CODE ANN. § 3503.01
Oklahoma, OKLA. CONST. art. III, § 1
Oregon, OR. CONST. art. II, § 2
Pennsylvania, PA. STAT. ANN. tit. 25, § 2811
Rhode Island, R.I. GEN. LAWS § 17-1-3
South Carolina, S.C. CODE ANN. § 7-5-610
South Dakota, S.D. CONST. art. VII, § 2; S.D. CODIFIED LAWS § 12-3-1
Tennessee, TENN. CODE ANN. § 2-2-102
Texas, TEX. ELEC. CODE ANN. § 11.002
Utah, UTAH CODE ANN. § 20A-2-101
Vermont, VT. STAT. ANN. tit. 17, § 2121
Virginia, VA. CONST. art. II, § 1
Washington, WASH. CONST. art. VI, § 1, amend. 63
West Virginia, W. VA. CODE § 3-1-3
Wisconsin, WIS. CONST. art. III, § 1; WIS. STAT. §§ 6.02, .05
Wyoming, WYO. STAT. ANN. § 22-1-102

Wills

In all 50 states and the District of Columbia, youth under the age of 18 cannot make a valid will.[28]

Alabama, ALA. CODE § 43-8-130
Alaska, ALASKA STAT. § 13.12.501
Arizona, ARIZ. REV. STAT. § 14-2501
Arkansas, ARK. CODE ANN. § 28-25-101
California, CAL. PROB. CODE § 6100
Colorado, COLO. REV. STAT. ANN. § 15-11-501

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[28]Seven states (Iowa, Kansas, Missouri, New Hampshire, Oregon, South Carolina, and Texas) allow married youth under the age of 18 to draw up wills. Iowa, IOWA CODE ANN. §§ 633.264, .3; Kansas, KAN. STAT. ANN. §§ 59-601, 38-101; Missouri, MO. ANN. STAT. § 474.310; New Hampshire, N.H. REV. STAT. ANN. § 551:1; Oregon, OR. REV. STAT. § 112.225; South Carolina, S.C. CODE ANN. §§ 62-2-501, 62-1-201; and Texas, TEX. PROB. CODE ANN. § 57. A similar exception for youth in the military exists in three states (Indiana, Missouri, and Texas), and for emancipated youth in four states (Idaho, Missouri, South Carolina, and Virginia.) Idaho, IDAHO CODE § 15-2-501; Indiana, IND. CODE § 29-1-5-1; Missouri, MO. ANN. STAT. § 474.310; South Carolina, S.C. CODE ANN. §§ 62-2-501, 62-1-201; Texas, TEX. PROB. CODE ANN. § 57; and Virginia, VA. CODE ANN. § 64.1-47.

Connecticut, CONN. GEN. STAT. ANN. § 45a-250
Delaware, DEL. CODE ANN. tit. 12, § 201
District of Columbia, D.C. CODE ANN. § 18-102
Florida, FLA. STAT. ANN. app. 2 § 731.04
Georgia, GA. CODE ANN. § 53-4-10
Hawaii, HAW. REV. STAT. § 560:2-501
Idaho, IDAHO CODE § 15-2-501
Illinois, 755 ILL. COMP. STAT. 5/4-1
Indiana, IND. CODE § 29-1-5-1
Iowa, IOWA CODE ANN. §§ 633.264, .3
Kansas, KAN. STAT. ANN. §§ 59-601, 38-101
Kentucky, KY. REV. STAT. ANN. § 394.030
Louisiana, LA. CIV. CODE ANN. art. 1476
Maine, ME. REV. STAT. ANN. tit. 18-A, § 2-501
Maryland, MD. CODE ANN., EST. & TRUSTS § 4-101
Massachusetts, MASS. GEN. LAWS ANN. ch. 191, § 1
Michigan, MICH. COMP. LAWS ANN. § 700.2501
Minnesota, MINN. STAT. ANN. § 524.2-501
Mississippi, MISS. CODE ANN. § 91-5-1
Missouri, MO. ANN. STAT. § 474.310
Montana, MONT. CODE ANN. § 72-2-521
Nebraska, NEB. REV. STAT. § 30-2326
Nevada, NEV. REV. STAT. 133.020
New Hampshire, N.H. REV. STAT. ANN. § 551:1
New Jersey, N.J. STAT. ANN. § 3B:3-1
New Mexico, N.M. STAT. ANN. § 45-2-501
New York, N.Y. EST. POWERS & TRUSTS LAW § 3-1.1
North Carolina, N.C. GEN. STAT. § 31-1
North Dakota, N.D. CENT. CODE § 30.1-08-01
Ohio, OHIO REV. CODE ANN. § 2107.02
Oklahoma, OKLA. STAT. ANN. tit. 84, § 41
Oregon, OR. REV. STAT. § 112.225
Pennsylvania, 20 PA. CONS. STAT. ANN. § 2501
Rhode Island, R.I. GEN. LAWS § 33-5-2
South Carolina, S.C. CODE ANN. §§ 62-2-501, 62-1-201
South Dakota, S.D. CODIFIED LAWS § 29A-2-501
Tennessee, TENN. CODE ANN. § 32-1-102
Texas, TEX. PROB. CODE ANN. § 57
Utah, UTAH CODE ANN. § 75-2-501
Vermont, VT. STAT. ANN. tit. 14, § 1
Virginia, VA. CODE ANN. § 64.1-47

Washington, WASH. REV. CODE ANN. § 11.12.010
West Virginia, W. VA. CODE § 41-1-2
Wisconsin, WIS. STAT. ANN. § 853.01
Wyoming, WYO. STAT. ANN. § 2-6-101

APPENDIX C

HEALTH PROFESSIONALS' CALL TO ABOLISH THE EXECUTION OF JUVENILE OFFENDERS IN THE UNITED STATES

We, the undersigned health professionals, scientists, medical associations and health organizations, urgently call for the abolition of the juvenile death penalty in the United States.

Our opposition to the execution of juvenile offenders – those younger than eighteen at the time of their crimes – is based on *our medical and scientific knowledge that these young people do not yet possess the maturity and mental capacities required to justify the imposition of the ultimate adult punishment.* We are deeply concerned, therefore, that the execution of juvenile offenders violates both common decency and firmly established principles of international human rights.

In calling for the abolition of the juvenile death penalty we by no means seek to minimize or excuse the offense of murder. While we recognize that justice demands accountability for such actions, we believe that executing young offenders is an inappropriate and unjust response. Our concerns are based on the following:

- **The juvenile death penalty contradicts medical and scientific knowledge of teenagers' development, maturity, and capacities.**

  - **Child and adolescent psychiatrists and psychologists condemn the execution of juvenile offenders.** Citing adolescents' cognitive and emotional immaturity compared to adults, their lesser ability to consider the consequences of their actions, their tendency to be more easily swayed by peers, and the greater likelihood that they will exercise poor judgment, the American Psychiatric Association, the American Academy of Child and Adolescent Psychiatry, the American Society for Adolescent Psychiatry, the American Academy of Psychiatry and the Law, and the National

Mental Health Association all vigorously oppose the juvenile death penalty.

- **The juvenile death penalty defies clinical physicians' familiarity with adolescent growth and development.** Pediatricians, family physicians and other clinical medical professionals are intimately familiar with the progress of their young patients' biological, cognitive and emotional development. Clinicians know – through their training and treatment – that their teenage patients lack the maturity and mental capacities of adults.

- **Neuroscience provides physiological evidence of adolescents' under-developed mental capacities.** Established principles and cutting-edge neuroscientific research together demonstrate that adolescent behavior is dominated by the region of the brain associated with impulse and aggression (the amygdala). The prefrontal cortex, which controls such impulse and aggression, and which permits anticipation of consequences, consideration of alternatives, planning, setting long-range goals, and organization of sequential behavior, *does not fully mature until well beyond age eighteen* (possibly as late as age twenty-three). Leading neuroscientists have observed, therefore, that it is unfair and unreasonable to impose expectations of adult-level capacities on the thinking and behavior of minors.

- **Childhood abuse, neglect and mental impairment can further diminish adolescents' lesser cognitive and emotional capacities**. It is not surprising then that young people who have experienced child abuse (including sexual abuse), neglect, neurological impairment, psychotic disorders or intellectual impairment are over represented on death row and among executed juvenile offenders.

- **Medical and scientific expertise merely reaffirms society's long-standing, common knowledge that adolescents are not yet fully mature.** Because of their relative immaturity, children under eighteen have long been denied much of the autonomy

and responsibility of adulthood, including the right to vote, serve in military combat, enter into contracts, serve on juries, drink alcohol or make medical decisions.

- **The juvenile death penalty violates universally accepted principles of international law.** The International Covenant on Civil and Political Rights and the United Nations Convention on the Rights of the Child, among other instruments, expressly prohibit the execution of offenders under eighteen at the time of their offenses.

- **The United States is the only nation that continues to execute juvenile offenders**, with the possible exceptions of Iran and the Democratic Republic of Congo. Nineteen U.S. states currently authorize executions of offenders who were 16 or 17 years old at the time of their offense. Five have prohibited the practice since 1989.

- **Since 1985 the U.S. has executed more juvenile offenders than the rest of the world combined.** Twenty-two juvenile offenders have been executed in the U.S. in the past 18 years.

- **The juvenile death penalty impedes U.S. ratification of the Convention on the Rights of the Child, which offers vital safeguards for the health and well being of children around the world.** The American Medical Association and the American Academy of Pediatrics, among others, urge Congress to ratify the Convention. Yet, the U.S. remains the only U.N. member (other than Somalia) to have failed to do so, in large part because the Convention proscribes the juvenile death penalty.

- **The juvenile death penalty fails to serve the stated purposes of capital punishment: deterrence and retribution.** Both purposes are based on the false premise that an adolescent's physical capacity to commit an adult crime is accompanied by the mental capacity to think and make decisions as an adult. In view of adolescents' lesser capacity to moderate impulsive behavior, however, deterrence is unlikely and "retribution" -- based on the false assumption of adult-level culpability -- is

misguided and cruel.

For these reasons, we urge the legislatures of the nineteen states currently permitting the juvenile death penalty to abolish the practice immediately. We also express the hope that the U.S. Supreme Court will declare the juvenile death penalty unconstitutional under the Eighth Amendment's prohibition of cruel and unusual punishment.

ENDORSERS OF THE HEALTH PROFESSIONALS' CALL TO ABOLISH THE EXECUTION OF JUVENILE OFFENDERS IN THE UNITED STATES

Unless otherwise indicated (with an *), endorsers sign solely in their individual capacities and do not represent the institutions with which they are affiliated; affiliations are listed for identification purposes only.

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Senior Scholar, C. Everett Koop Institute at Dartmouth, and Elizabeth DeCamp McInerny Professor Of Surgery, Dartmouth Medical School; Surgeon General of the United States of America, 1981-89

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Laurence Steinberg, Ph.D.

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Alphabetical Listing of Endorsers

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American Academy of Child and Adolescent Psychiatry

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American Academy of Pediatrics

Executive Committee, North Carolina Council of Child and Adolescent Psychiatry
American Academy of Child and Adolescent Psychiatry

The International Pediatric Association

The Kentucky Psychiatric Medical Association

The Texas Society of Child and Adolescent Psychiatry
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APPENDIX D

Policy Statement of the American Academy of Pediatrics and the Society for Adolescent Medicine

EXECUTING JUVENILE OFFENDERS: A FUNDAMENTAL FAILURE OF SOCIETY

The Society for Adolescent Medicine (SAM) and the American Academy of Pediatrics (AAP) have the protection of the health and well-being of adolescents as a primary goal. With this joint policy statement SAM and AAP express our strong opposition to the juvenile death penalty and call upon the United States Supreme Court, the federal government, and states to abolish the practice of executing juvenile offenders.

SAM and AAP have previously affirmed the importance of ensuring the health and well-being of young people who are involved in the juvenile and criminal justice systems.[1, 2] It is well established that the vast majority of adolescents involved in these systems suffer from serious psychological and physical health problems and are more likely than the general adolescent population to have been victims of child abuse or neglect and to have experienced school failure or learning disabilities.[3]

For more than a century, the juvenile justice system has been based on the principle that young people who commit crimes should have an opportunity for rehabilitation and treatment. The imposition of the death penalty for juvenile offenders represents the ultimate rejection of that principle. The execution of offenders who were under age 18 at the time of their crime is expressly prohibited by

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[1] Society for Adolescent Medicine. Health care for incarcerated youth: Position paper of the Society for Adolescent Medicine, *Journal of Adolescent Health*, 2000;27(1):73-75.

[2] American Academy of Pediatrics. Policy statement: Health care for children and adolescents in the juvenile correctional care system, *Pediatrics*, 2001;107(4):799-803.

[3] Council on Scientific Affairs, American Medical Association. Health status of detained and incarcerated youths. *JAMA*, 1990; 263(7):987-991.

international law in several treaties, such as the United Nations' Convention on the Rights of the Child, the American Convention on Human Rights, the International Covenant on Civil and Political Rights, and the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, and numerous resolutions and reports by other international bodies such as the European Union, the United Nations Economic and Social Council, and the United Nations Sub-Commission on Human Rights.[4, 5, 6]

The Society for Adolescent Medicine and the American Academy of Pediatrics add our voices to the emerging national and international consensus opposing the death penalty for juvenile offenders. SAM and the AAP are committed to working with other professionals to address the comprehensive health care needs of young people in the context of their families, schools, and communities. We view the execution of juvenile offenders as the most fundamental failure of society to provide young people with the supports they need to grow up to lead healthy, responsible, and productive lives.

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[4] de la Vega, C. Amici Curiae urge the U.S. Supreme Court to consider international human rights law in juvenile death penalty case, 42 Santa Clara Law Review 1041, 2002.

[5] United Nations Office of the High Commissioner for Human Rights, Convention on the Rights of the Child, available at http://www.unhchr.ch/html/menu3/b/k2crc.htm, visited May 13, 2004.

[6] European Union. EU memorandum on the death penalty, available at http://www.eurunion.org/legislat/DeathPenalty/eumemorandum.htm, visited May 13, 2004.

APPENDIX E

State Requirements Regarding the Interrogation of Youth

A number of states mandate that a juvenile's parent/guardian, legal custodian or attorney be present during questioning, or at the very least that the minor be given the opportunity to consult with a parent/guardian or attorney before waiving his rights. *See, e.g.,*

Colorado
COLO. REV. STAT. § 19-2-511 (statements by a juvenile resulting from custodial interrogation are inadmissible unless parent/guardian or legal or physical custodian was present at the interrogation and both were advised of the juvenile's rights and both waived the rights in writing; if parent/guardian or custodian not present, statements may be admissible if attorney present).

Indiana
IND. CODE § 31-32-5-1 (rights guaranteed to child can be waived by (1) counsel for child if child knowingly and voluntarily joins the waiver; (2) child's parent/guardian or custodian if that person knowingly and voluntarily waives, has no adverse interest, meaningful consultation has occurred between that person and child, and child knowingly and voluntarily joins in waiver; or (3) emancipated child).

Iowa
IOWA CODE § 232.11 (child less than 16 years of age cannot waive right to be represented by counsel in custodial interrogation the written consent of the child's parent, guardian or custodian; waiver by child 16 years of age and older is only valid if good faith effort made to notify parent/guardian or custodian of child's location, alleged act, and right to visit and confer with child).

Maine
ME. REV. STAT. ANN. tit. 15 § 3203-A(2-A) (when juvenile is arrested, officer may not question juvenile until either: legal custodian is present during questioning; legal custodian gives consent for questioning in his/her absence; or after reasonable effort, officer cannot contact custodian and officer seeks to question

juvenile about continuing or imminent criminal activity).

Mississippi
MISS. CODE ANN. § 43-21-303(3) (person taking child into custody shall make continuing reasonable efforts to notify and invite them to be present during questioning), *see also M.A.C. v. Harrison County Family Court*, 566 So.2d 472, 475 (Miss. 1990) (holding that parent has statutory right to be present during interrogation of child)

New Jersey
In the Interest of J.F., 668 A.2d 426, 430 (N.J. 1995) (holding that police may interrogate a juvenile without a parent/guardian present "only if juvenile has withheld their names and addresses, a good faith effort to locate them is unsuccessful, or they simply refuse to attend the interrogation".

Texas
TEX. FAM. CODE ANN. § 51.09 (child can only waive rights if waiver made in writing by attorney and child).

Vermont
In re E.T.C., 449 A.2d 937, 940 (Vt. 1982) (before juvenile can waive rights, he must be given opportunity to consult with an adult (i.e, parent, legal guardian or attorney) who is completely disassociated from the prosecution and is informed of the juvenile's rights).

APPENDIX F

Juvenile False Murder Confessions
16 year olds and 17 year olds

16 year olds

CHESNET, ALLEN JACOB
Maryland, 1998. Crime: Chesnet's neighbor was found stabbed to death. Chesnet confessed to murder; charges were dropped. The 16 year old Chesnet was brought in for questioning soon after the body was found. Police were suspicious of Chesnet because he had a fresh cut on his hand and blood on his clothes. Police told Chesnet's parents he was not a suspect, and thus, did not need a lawyer. After 15 hours of interrogation Chesnet confessed, in part because police lied to him, telling him DNA evidence at the crime scene implicated him. In actuality, DNA evidence exonerated Chesnet and implicated the true perpetrator who eventually pled guilty to the crime. However, police and prosecutors failed to release this information for several months; Chesnet spent six months in custody before he was released. Chesnet also claims he was stabbed and raped while in custody. His explanation for falsely confessing: "In my head, I thought if I told them stuff, they would let me go." Todd Richissin, *Held without Proof, Boy Free; He's Jailed 6 Months, Even after DNA Test Debunks Evidence,* BALTIMORE SUN, November 20, 1998; Carl Hamilton, *Convicted Killer Wants to Change Guilty Plea,* THE CECIL WHIG, October 21, 1999; Del Quentin Wilber,"*Teen Tormented by an Erroneous Charge of Murder; Jailed Six Months in Woman's Killing, He Seeks $18 Million*" BALTIMORE SUN, April 23, 2001.

OLMETTI, DON
Illinois, 1997. Crime: Sonia Hernandez, a teacher, was robbed and murdered. Olmetti confessed to the robbery and murder; charges were dropped. Police picked up 16-year-old Olmetti for questioning after receiving a tip. Olmetti, who is borderline mentally retarded, was questioned at a police station for 18 hours before confessing to the crime. His parents claim that they were denied access to their son during his questioning, and told he was not present at the station while he was being interrogated in another room. Olmetti claims that police beat him and forced him to sign the written confession. Olmetti spent two years in the Cook County Jail awaiting trial, despite the fact that

attendance records and teacher statements uncovered one month after his arrest showed that at the time of the murder Olmetti was at another school, more than a mile from the scene of the crime. Murder charges were finally dropped against Olmetti in 1999. Annie Sweeney, *Student Charged in Teacher Slaying; Police Say 16-Year-Old Killed to Steal Just $4,* CHI. TRIB., April 4, 1997; Rosalind Rossi and Ernest Tucker, *Suspect in murder of teacher was on school suspension,* CHI. SUN TIMES, April 5, 1997; Diane Struzzi, *Murder Case Dropped, Teen Still Held; Questions Remain 2 Years after Arrest,* CHI. TRIB., May 18, 1999.

PENNINGTON, DUSTAN

Illinois, 1988. Crime: Motel clerk Lucille Betz was murdered. Pennington confessed to murder; he was acquitted of charges of murder, arson and burglary (related to the murder). He was 16 at the time he was arrested. After thirteen hours of "grueling interrogation" and threats of life imprisonment, Pennington signed a written confession. Pennington testified at his trial in January 1989 that he was so upset during the interrogation that he did not even read the confession prior to signing it. He had only been given food once during the 13 hours. His attorney claimed, "They worked him hard and long. He was grilled and grilled and grilled and grilled until he was well-done. They kept yelling at him. This is coercion at its worst." Pennington's mother also claimed that police officers told her that her son did not need an attorney. Witnesses placed Pennington elsewhere during the murder, and another man charged with the same murder claimed that Pennington was not at the scene during the crime. Before the trial, Charles Daubman, another suspect, told police that Pennington was not present at the crime. Prosecutors refused to release him, saying there must have been a number of perpetrators, though Pennington's confession said he had acted alone. Pennington was acquitted at trial and two other men (including Charles Daubman) were later charged with the crime. When asked why he confessed to murder, Pennington said, about the detective who interrogated him: "He told me if I didn't tell them I did it he was going to send me to prison for the rest of my life." Robert Kelly, *Murder Suspect Says He Confessed Due to Threats,* ST. LOUIS. POST DISP., January 24, 1989, -Robert Kelly and Safir Ahmed, *Tape Uncovers Pact to Take Murder Rap,* ST. LOUIS. POST DISP., January 26, 1989; Robert Kelly, *Youth Cleared in Slaying,* " ST. LOUIS. POST DISP., January 27, 1989.

17 year olds

BEALE, COREY

Maryland, 1998. Crime: Beale's friend, Michael Harley, was stabbed to death. Beale confessed to murder; charges were dropped. The 17-year-old with learning disabilities was interrogated for over three days. During this time, he claims that he was slammed against a wall, deprived of sleep, and threatened with execution. Interrogators repeatedly denied Beale's multiple requests to see his mother or lawyer. At one point during the interrogation, Beale signed a "release form" he believed would allow him to go home, but instead it was a release of his Miranda rights. Coerced into confessing, Beale ended up giving four different conflicting statements. He later stated, "I would have said anything to get out of that room." During trial, prosecutors were contacted by police from a neighboring county and presented with evidence that exonerated Beale. Beale was released after spending 10 months in custody. The true perpetrator was later arrested and pled guilty. *Beale's Changing Statements,* WASHINGTON POST, June 4, 2001; April Witt, *FALSE CONFESSIONS: In Pr. George's Homicides, No Rest for the Suspects,* WASHINGTON POST, June 4, 2001; Michael Amon, *Man Pleads Guilty in 1998 Slaying; Detectives had Elicited a False Confession from Another Man,* WASHINGTON POST, July 3, 2002.

BRADFORD, MARCELLIUS

Illinois, 1986. Crime: a medical student was raped and murdered. Bradford confessed; he pled guilty to kidnapping and was sentenced to 12 years. Bradford, who was 17 years old at the time, yet 18 when he was arrested, confessed after spending 15 hours in police custody. During his confession Bradford implicated, 14-year-old Calvin Ollins, and two other defendants. Bradford and Ollins both later recanted their confessions and asserted that they were false. During the interrogation, Bradford was told he could go home if he just confessed. Police provided him with a handwritten paper that outlined the crimes, which he was told to study for several hours before the assistant state's attorney took his statement. Bradford claims he was beaten during the interrogation, a claim his family made first, hours after he confessed when they saw him covered in bruises. In order to get a lesser sentence, Bradford agreed to a plea bargain and testified against one of the other defendants. Bradford was sentenced to 12 years, was paroled after spending six years in custody, and was later sent back to prison on a burglary conviction. At the time of the original trial, the semen found

in the victim was that of a secretor—someone whose blood type can be detected from bodily fluids such as sweat and saliva. None of the four boys charged, including Bradford, were secretors, yet they were convicted regardless. In 2001, new DNA tests indicated that semen found on the victim's body could not have come from any of the four defendants. All four defendants filed wrongful imprisonment suits against police and prosecutors. Two new suspects that were connected to the crime through DNA evidence were arrested and charged in 2002; they are currently awaiting trial. Abdon M. Pallasch, *They Endured Rats in Their Cells*, CHICAGO SUN-TIMES, January 20, 2002; Steve Mills & Maurice Possley, *Final Roscetti DNA test clears 4,* CHICAGO TRIBUNE, December 4, 2001; Maurice Possley and Steve Mills, *New Evidence Stirs Doubt over Murder Convictions; DNA, Recantations Suggest 4 Inmates Innocent in '86 Case*, CHI. TRIB., May 2, 2001; Steve Mills and Maurice Possley, *Report Alleges Crime Lab Fraud; Scientist is Accused of Providing False Testimony*, CHI. TRIB., January 14, 2001; Maurice Possley and Steve Mills, *Crime Lab Analyst Hit as 3 Seek New Trials; Testimony Disputed in '86 Slaying*, CHI. TRIB., January 27, 2001; *88 Murder Verdict challenged; 'Scientific Fraud' in Analysis of Evidence Charged*, THE STATE JOURNAL-REGISTER, February 9, 200; Janet Rausa Fuller, *Roscetti's Ordeal Retraced*, CHI. SUN-TIMES, February 9, 2002.

GRAY, PAULA

Illinois, 1978. Crime: Larry Lionberg and Carol Schmal were taken to a townhouse where Ms. Schmal was raped and both were murdered. Paula Gray confessed to being present during the crimes and named four men -- Kenneth Adams, Verneal Jimerson, Willie Rainge, and Dennis Williams – as the perpetrators. Her confession was the cornerstone of the prosecution of the men referred to as the Ford Heights Four. Police interrogated Gray, a borderline mentally retarded 17 year old, for two nights in motels before she confessed. Soon thereafter Gray recanted her confessions, and was subsequently charged with rape, murder, and perjury. Gray was convicted and sentenced to 50 years in prison for the murders and perjury. While working for an assignment, Northwestern University journalism students found a police report filed a week after the murder that implicated four other suspects. Police failed to turn this report over to defense attorneys. The report detailed that within a week of the crime, a witness had told the police that they had arrested the wrong men. The witness said he heard shots fired, saw four men run away from the scene, and the next

day saw them selling items taken from the robbery of the victims. One of the four men identified by the witness was dead, but the other three eventually confessed. DNA testing corroborated their confessions and conclusively established the innocence of Paula Gray and the Ford Heights Four. William Freivogel, *Lessons from 13 Innocent Men*, ST. LOUIS POST-DISPATCH, April 30, 2000; *The Exonerated: Paula Gray*, Website of Center on Wrongful Convictions, Northwestern University School of Law, available at http://www.law.northwestern.edu/depts/clinic/wrongful/exonerations/Gray.htm.

GREEN, DENNIS DEONTE

Maryland, 2000. Crime: a fight between two groups of young men ended in a triple shooting, killing one man and injuring two others. Green, a 17-year-old, confessed to murder; charges were dropped. Green was interrogated at length in a "cold, cramped" interrogation room. He initially waived his right to counsel, though as questioning wore on he asked to call a lawyer. A detective told him "[y]ou are not getting a phone call until I hear what I want to hear." At one point during the interrogation officer wearing a "Forensics" jacket swabbed Green's hands, apparently for evidence of gunpowder residue. The test was bogus, but police told Green there was evidence he fired a gun recently, and the gun he fired was the same caliber as the murder weapon. Green then asked to be given a lie detector test, sure that it would exculpate him. A detective threatened to "kick his ass" if it came back wrong. He never took the test. Finally, Green was told that his friend, in another interrogation room, had just given him up, and an officer who had "befriended" him advised him that he would fare better in court if he confessed and pled self-defense. Green then gave police his third statement of the night, writing out a confession detailing how he shot the three victims. Green later stated "I'd been sitting in that room for hours. When I seen that he still believed whatever was circulating with the rest of the cops, I don't know, I just gave up. I didn't feel like going through no more. I started answering questions the way they wanted. Because they wouldn't let me make no phone call." Green's interrogation was so lengthy that by the time detectives stopped questioning him, he was too tired to sit up. Ultimately, Green's statement contained factual inconsistencies with crime scene evidence, and forensic evidence proved it was not physically possible for Green to be the shooter. After spending six weeks in custody Green was released, and police labeled Green as a victim in the shootout, not a perpetrator. April Witt, *Allegations of Abuse Mar Murder Cases*,

WASHINGTON POST, June 3, 2001; April Witt, *Police Bend, Suspend Rules; Pr. George's Officers Deny Suspects Lawyers, Observers Say,* WASHINGTON POST, June 5, 2001; April Witt and Ruben Castaneda, *FBI to Probe Prince George's Interrogations; 3 Confessions Raise Civil Rights Questions*, WASHINGTON POST, June 8, 2001; April Witt, *Witness Changes Account on Stand; Man Was to Accuse Friend in Slaying*, WASHINGTON POST, August 23, 2001.

HAYES, MARIO

Illinois, 1996. Crime: a man was beaten to death by a group of young men. Hayes confessed; a jury acquitted him after his second trial. Investigation into the crime resulted in the arrest of six gang members; one of which was 17-year-old Hayes. Hayes began his pre-dawn interrogation by denying he had anything to do with the beating, but he eventually confessed. Yet, according to police records, Hayes was in jail at the time of the assault. He later testified detectives had coerced him into confessing and fed him details of the crime. At least four of the six suspects claimed that detectives mistreated them during their interrogations. One suspect, Hayes' twin brother Marcus, was allegedly denied water during his interrogation and was given a cup of urine instead. He and the four other suspects implicated Mario Hayes in the beating. Prosecutors took the case to trial on the basis of the confessions, despite that police records placed Hayes in prison at the time of the beating. In Hayes' first trial the jury deadlocked, voting 11-1 for acquittal. When prosecutors retried him the jury only took three hours to acquit him. Hayes spent a total of two and half years in custody. Steve Mills, *'Killer' in Jail When Crime Committed; Teen Accuses Cops of Coercing Him into Admitting Guilt*, CHI. TRIB., April 29, 1998; Steve Mills, *2nd Check Confirms Accused Killer's Story; He was in Jail at Time of Murder*, CHI. TRIB., May 5, 1998; Maurice Possley, *Controversy Still Clouding Murder Case; Eyewitness Changed Story, Lawyer Says*, CHI. TRIB., February 16, 1999; James Hill, *Retrial Begins Same as Original One Did,* CHI. TRIB., June 3, 1999; James Hill, *Evidence in Murder Case Too Flawed to Suit Jury*, CHI. TRIB., June 8, 1999.

HENLEY, ERIC

Illinois, 1990. Crime: a homeless man was beaten to death. The 17-year-old Henley confessed; charges were dropped. Five teenagers were arrested, and after being interrogated four of the five confessed. (Rodney Brown, Antwon Coleman, Eric Henley, and Roderick

Singleton). The teenagers ranged between 14 and 17 years old. Their defense attorneys hired a private investigator that obtained a confession from one of the actual perpetrators. Prosecutors dismissed first-degree murder charges against all five of the teenagers in exchange for a guilty plea of the crime of stealing the dead man's pickup truck. The youths were sentenced to one year of probation. Michael D. Sorkin *Teens Cleared of Killing Homeless Man in Alton,* ST. LOUIS POST-DISPATCH, July 17, 1990; Robert Kelly, *Probe Continues Into Teens' Confessions* ST. LOUIS POST-DISPATCH, July 31, 1990; Robert Kelly, *Judge Rejects Withdrawal of Guilty Plea*, ST. LOUIS POST-DISPATCH, September 7, 1990.

KING, CHARLES

Illinois, 1992. Crime: a 9-year old girl was killed. King confessed to the murder after three days of questioning; King was transferred from prison to a state mental institution and was later released. King was a 17-year-old with an IQ of 57. He worked at the high school where the body was found and was implicated when the girl's young friend described the perpetrator as a black man in a white shirt and jeans. A janitor told police that King fit that description. He was never identified from a line-up. One year later, after two other children were killed, a serial killer confessed to the 9-year-old's murder. King was released after thirteen months of incarceration. Roy Malone & Harry Levins, *Police Say Man Has Confessed To 5 Killings,* ST. LOUIS POST-DISPATCH, August 29, 1993; *Confession of Multiple Child Killer Frees Retarded Man After Year of Confinement*, ST. LOUIS POST-DISPATCH, April 12, 1998.

(9)

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In The

Supreme Court of the United States

DONALD P. ROPER, SUPERINTENDENT,
POTOSI CORRECTIONAL CENTER,

Petitioner,

v.

CHRISTOPHER SIMMONS,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Missouri

BRIEF OF *AMICUS CURIAE* MISSOURI BAN YOUTH EXECUTIONS (BYE) COALITION IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS*

The Missouri Ban Youth Executions (BYE) Coalition represents thousands of Missouri citizens across the social spectrum.[1] It is comprised of more than twenty groups having an interest in adolescent development and behavior, including medical and health associations, as well as educational, religious, service, and child advocacy organizations. Among BYE's members are the Missouri Juvenile Justice Association, Citizens for Missouri's Children, and the state chapters of the National Education Association and the National Association of Social Workers. A list of BYE Coalition members endorsing this brief is attached hereto as Appendix 1.

BYE formed in the fall of 2002 to end the death penalty for minors in our state. Many of the BYE Coalition member groups have no position on the death penalty in general, while some oppose the practice in all instances. Its members are nevertheless united in opposing the execution of juvenile offenders as a violation of our state and federal prohibitions against cruel and unusual punishment.

Amicus files this brief with the written consent of petitioner and respondent (enclosed), pursuant to Rule 37.3(a).

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[1] Pursuant to Rule 37.6, *amicus* hereby states that counsel for neither party has authored any portion of this brief. The Missouri BYE Coalition has received financial assistance from the following organizations to defray the expenses of preparing this brief: a) The Justice Project, 1725 Eye Street Northwest, Fourth Floor, Washington, D.C., and b) The Tides Foundation, New York Office, 40 Exchange Place, Suite 1111, New York, N.Y.

SUMMARY OF ARGUMENT

Amicus concurs with the Missouri Supreme Court's observation that our sense of cruel and unusual punishment must be "guided by the 'evolving standards of decency that mark the progress of a maturing society.'" *State ex rel. Simmons v. Roper*, 112 S.W.3d 397, 401 (Mo. banc 2003), quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958). Such standards are not static, but must "acquire meaning as public opinion becomes enlightened by a humane justice." *Simmons*, 112 S.W.3d at 401, quoting *Weems v. United States*, 217 U.S. 349, 378 (1910).

Recent events document a growing consensus against juvenile executions in Missouri, the United States and the world. It has taken many forms, including legislative actions, jury decisions, statements by professional associations, public opinion, and courts' frequent reversals of death sentences imposed on juvenile offenders. But notwithstanding this consensus, the execution of citizens who are not considered mature enough to enter contracts, vote, or serve on juries, and who have been demonstrated by scientific evidence to lack the cognitive skills and decision-making abilities of adults, violates the "basic concept underlying the Eighth Amendment," which is "nothing less than the dignity of man." *Trop*, 356 U.S. at 100.

ARGUMENT

I. THE PHYSIOLOGICAL BASIS OF JUVENILES' IMPAIRED SENSE OF JUDGMENT, AS ILLUSTRATED BY EMERGING SCIENTIFIC EVIDENCE, UNDERMINES ANY LEGITIMATE PENOLOGICAL PURPOSE OF EXECUTING JUVENILE OFFENDERS.

A criminal sanction is cruel and unusual if, among other things, it is "so totally without penological justification that it results in the gratuitous infliction of suffering." *Gregg v. Georgia*, 428 U.S. 153, 183 (1976). In holding that the death penalty does not categorically violate the Eighth Amendment, *Gregg* examined the purported social objectives of retribution and deterrence. *Id.* at 183-86. But neither goal is met by executing juvenile offenders. The principle of retribution reserves the harshest punishment for those considered the most deserving, but juveniles are by their very status considered too immature for a wide variety of adult rights, privileges and responsibilities. Similarly, the deterrence of prospective offenders cannot justify the execution of a class of offenders defined by their impulsiveness and diminished capacities. *See State ex rel. Simmons v. Roper*, 112 S.W.3d 397, 412 (Mo. banc 2003).

This Court's assessment of society's evolving standards of decency now takes account of "evidence [of] . . . a much broader social and professional consensus," including the views of organizations with relevant expertise. *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002); *accord Thompson v. Oklahoma*, 487 U.S. 815, 830-31 & n.31 (1988) (considering the views of "respected professional organizations, by other nations that share our Anglo-American heritage, and by the leading members of the Western European community"). The Missouri BYE

Coalition files this brief to represent its members' experience as professionals and volunteers who work with adolescents in the state where this case originated.

Adolescence is a transformative and often turbulent period of life when one is no longer a child, but is not yet an adult. Science has shown that the ability to soundly judge and plan for the future are among the last characteristics to mature among young people. "The current research on adolescence indicates that during this transitional stage, a young person's cognitive abilities, emotions, judgment, impulse control, identity and their brain are still developing," reported Elizabeth Gaines, a Youth Policy Analyst with Citizens for Missouri's Children, in testimony she offered during a March 2003 public hearing before the Senate Judiciary and Civil and Criminal Jurisprudence Committee, in support of Senate Bill 312. The bill would have raised the minimum for death penalty consideration to eighteen years of age in Missouri. The Missouri Psychological Association (MOPA) took a similar stand in 2004, concluding that "recent MRI neurodevelopmental studies are seen as a scientific tipping point, shedding light on adolescent neurologic maturation as it relates to juvenile culpability." Scientific Affairs Committee Report from MOPA Board of Directors Meeting, June 3, 2004 (on file with counsel).

The disadvantaged environment in which many juvenile offenders are raised exacerbates their tendency toward impulsiveness and poor judgment. Once in the criminal justice system, they are prone to poor decisions and errors that an adult in the same situation would be unlikely to make. According to Gaines' testimony on behalf of Citizens for Missouri's Children, "Studies show that

youth who commit violent acts most often experienced maltreatment, and were exposed to a number of risk factors that make them more susceptible to becoming a violent offender."

Missouri's experience with the juvenile death penalty exemplifies these findings. Since Missouri enacted a death penalty statute in 1977, four individuals have been sentenced to death for murders committed as juveniles. All four fit the nationwide sociological profiles of juveniles who ultimately commit murder: they led lives marred by physical abuse, poverty, neglect, sexual molestation, mental illness, and inadequate intervention by social service agencies. *See* Chris Mallett, *Socio-Historical Analysis of Juvenile Offenders on Death Row*, Juvenile Correctional Mental Health Report (July 2003), at 63.

• ***Heath Wilkins*** stabbed liquor store attendant Nancy Allen when he was only sixteen years old. Having spent more than half of his life in state-run institutions, he was living in a public park at the time of the crime. The trial court accepted Wilkins' stated desire to represent himself and to be sentenced to death at age seventeen. *See* Benita Y. Williams, *Years of Appeals End in Guilty Plea; Man Sentenced to Death as Teen Won't Be Executed*, Kansas City Star, May 21, 1999, at B1. "He was a severely abused, abandoned, homeless teenager. . . . In 1986, he gave up the right to plead to a lesser charge because he didn't know he could," said his habeas attorney Sean D. O'Brien. *Id.* Wilkins was re-sentenced to three life sentences in May 1999, and apologized to Allen's relatives. "I am deeply sorry for the crime I committed. It is to you that I owe the apology. There is nothing I can do to repay the loss caused by my stupidity. I know that'll never be enough. I'm sorry." *Id.*

• ***Antonio Richardson*** was sixteen years old when he participated in the 1991 murders of Julie and Robin Kerry. Richardson grew up in a fatherless home, with a mother who routinely abandoned her three children for days or weeks to use her federal-assistance check to purchase drugs and alcohol and to live with a series of boyfriends. As the eldest child, he was forced to fend for himself and his brother at age seven. The two made their living by searching out relatives and stealing. The night before trial, an activist-journalist visited Richardson in his cell and convinced him to reject the prosecution's offer of a life sentence in return for a plea of guilty to first degree murder, and instead to fight for his "innocence." He went to trial and received a sentence of death. *See* American Bar Association, *Borderline Retarded and Juvenile Offender Antonio Richardson No Longer Faces Execution in Missouri*, available at <http://www.abanet.org/crimjust/juvjus/richardson.html> (last visited June 24, 2004). In an unpublished order, the Missouri Supreme Court recently reduced Richardson's sentence to life without parole under state law and *Ring v. Arizona*, 536 U.S. 584 (2002). *See* Editorial, *Juries Must Decide*, St. Louis Post-Dispatch, Oct. 31, 2003, at B6.

• ***Frederick Lashley*** was seventeen years old when he murdered his foster mother, and was executed by the State of Missouri in 1993. According to Amnesty International, Lashley "had been abandoned at a young age by his mother and had been brought up by relatives. He began drinking alcohol heavily at the age of 10 and at the time of the crime was homeless. At his trial he was represented by a lawyer who had never previously acted in a capital case." *See* Amnesty International, *Juveniles and the Death Penalty: Executions Worldwide Since 1985*, available at

<http//:www.amnestyusa.org/abolish/act500298.html> (last visited June 24, 2004).

• ***Christopher Simmons*** endured an abusive and dysfunctional family environment, primarily at the hands of a stepfather who routinely beat him, once to the point of puncturing his eardrum. The stepfather also brought Simmons to a tavern when he was a child, and forced him to drink alcohol for the amusement of other patrons. On one occasion, he took Simmons fishing and tied him to a tree for hours so that he would not wander away. As a teenager, Simmons turned to drugs and alcohol to escape his reality, and then to theft and burglary to support his habits. He and an accomplice killed Shirley Crook in the process of one such theft. *See* American Bar Association, *Chris's Case*, available at <http//:www.abanet.org/crimjust/juvjus/simmons.html> (last visited June 24, 2004). The Missouri Supreme Court twice stayed Simmons' scheduled executions before overturning his death sentence in August 2003. *See State ex rel. Simmons v. Roper*, 112 S.W.3d 397 (Mo. banc 2003).

Through its laws and institutions, our society and state already recognize the dangers and vulnerabilities of youth. We commit great resources to protect children from drugs, violence and sexual activity, as well as to encourage positive development through character education, mentoring, and other programs. Moreover, we set eighteen as the age of legal responsibility. A Missouri citizen must be at least eighteen to vote, consume tobacco, drive without restrictions, make independent medical decisions, or enter into enforceable contracts. We shelter juveniles from these activities because of our shared belief that they lack the maturity to manage these responsibilities and their consequences. In fact, Missouri is so concerned about the

impetuosity of youth that it is one of only two states to set a minimum age of twenty-one for service on juries – including those that sentence juvenile offenders for death-eligible crimes. *See* Mo. Rev. Stat. § 494.425.1 (2000).

These restrictions and protections reflect a broad understanding that juveniles are more vulnerable to poor judgment than are their adult counterparts, and less blameworthy when they succumb to it. The ultimate punishment must be reserved for more deserving offenders, if it must persist at all. *See Atkins v. Virginia*, 536 U.S. 304, 319 (2002) ("Since *Gregg*, our jurisprudence has consistently confined the imposition of the death penalty to a narrow category of the most serious crimes.").

II. MISSOURI'S EXPERIENCE DEMONSTRATES AN UNACCEPTABLE RISK THAT A DEATH SENTENCE WILL BE IMPOSED BECAUSE OF AN OFFENDER'S YOUTH, RATHER THAN IN SPITE OF IT.

When offenders with reduced capacity are eligible for capital punishment, there is a risk "that the death penalty will be imposed in spite of factors which may call for a less severe penalty." *Atkins v. Virginia*, 536 U.S. 304, 320 (2002), quoting *Lockett v. Ohio*, 438 U.S. 586, 605 (1978). *Atkins* observed that a defendant's mental retardation "can be a two-edged sword that may enhance the likelihood that the aggravating factor of future dangerousness will be found by the jury." 536 U.S. at 321.

Such was the case for Christopher Simmons, whose prosecutor requested a death sentence *because* of respondent's youth:

> As I told you yesterday, he used his age in committing this offense because he didn't believe that you would think that he was capable of it. Well, you do, and you have found it. Don't let him use his age to protect himself now, because then he wins.

Trial Tr. 1136-37.

> Let's look at the mitigating circumstances. Let's look at that. He listed the mitigating circumstances. I don't have them in front of me here. Age, he says. Think about age. Seventeen years old. Isn't that scary. Doesn't that scare you? Mitigating? Quite the contrary I submit. Quite the contrary.

Trial Tr. 1156-57.

Quantitative research documents the existence of a "two-edged sword" for Missouri minors facing the death penalty. Younger defendants in Missouri are particularly vulnerable to harsh treatment from prosecutors and courts, precisely because they lack the experiential, social and economic capital possessed by their elders. *See* Michael Lenza, David Keys & Teresa Guess, *The Prevailing Injustices in the Application of the Death Penalty in Missouri, 1978-1996*, available at <http://www.umsl.edu/~phillips/dp/Lenza1.html> (last visited June 24, 2004). Among other things, Lenza et al. found that those accused of homicide offenses while under the age of eighteen were actually one-sixth *more* likely than their adult counterparts to be charged with death-eligible capital murder. *See* Appendix 2 (David Keys affidavit).[2] "Being a minor in

[2] Capital murder has since been abolished as a separate offense in Missouri. Current law provides a sentence of death or life without the

(Continued on following page)

Missouri tends to act as an aggravator, as minors have less social value." Lenza et al., *supra*.

III. THE EXECUTION OF JUVENILE OFFENDERS VIOLATES CONTEMPORARY STANDARDS OF DECENCY ON A NATIONAL LEVEL AS WELL AS IN MISSOURI ITSELF.

Our evolving standards of decency are to be measured by "objective factors to the maximum possible extent." *Coker v. Georgia*, 433 U.S. 584, 592 (1977). Legislative enactments are the clearest and "most reliable" such measure. *See Penry v. Lynaugh*, 492 U.S. 302, 331 (1989). The court must consider not only the absolute number of states that authorize the death penalty for a given set of offenders, but also any discernible trend in recent legislative enactments. "It is not so much the number of these States that is significant, but the consistency of the direction of change." *Atkins v. Virginia*, 536 U.S. 304, 315 (2002).

Since this Court's opinion in *Stanford v. Kentucky*, 492 U.S. 361 (1989), eight death penalty states have abolished the practice for offenders younger than eighteen years of age. Indiana and Montana did so by legislative bills in 2001, while South Dakota and Wyoming did so in March 2004. *See* Ind. Code Ann. § 35-50-2-3(b)(1)(A) (West Supp. 2003); Mont. Code. Ann. § 45-5-102(2) (2003); 2004 S.D. Laws Ch. 166 (S.B. 182); 2004 Wyo. Sess. Laws Ch. 29 (H.B. 5). Kansas and New York enacted the death penalty in 1994 and 1995, respectively, but both set eighteen as

possibility of parole for first degree murder. *See* Mo. Rev. Stat. § 565.020.2 (2000). The initial decision of whether to seek the death penalty in a case of first degree murder is, of course, the prosecutor's.

the minimum age. *See* Kan. Stat. Ann. § 21-4622 (2000); N.Y. Penal Law § 125.27(1)(b) (McKinney 2004) (exempting juveniles from death-eligible offense of first degree murder). In 1993, the Washington Supreme Court construed its death penalty statute to exempt juvenile offenders – an action similar to that taken by the Missouri Supreme Court as a matter of constitutional law. *State v. Furman*, 858 P.2d 1092, 1102-03 (Wash. 1993). Including the twelve states that do not have the death penalty at all, there are now thirty-one states that prohibit the execution of juvenile offenders, compared to the thirty states that prohibited execution of mentally retarded defendants when *Atkins* was decided. *See State ex rel. Simmons v. Roper*, 112 S.W.3d 397, 408 (Mo. banc 2003).[3]

Likewise, not a single state has lowered its death-eligibility threshold to an age below eighteen, nor enacted a capital punishment statute that permits juvenile executions. *Cf. Atkins*, 536 U.S. at 315-16 ("Given the well-known fact that anticrime legislation is far more popular than legislation providing protections for persons guilty of violent crime, the large number of States prohibiting the execution of mentally retarded persons (and the complete absence of States passing legislation reinstating the power to conduct such executions) provides powerful evidence that today our society views mentally retarded offenders as categorically less culpable than the average criminal."). Of the nineteen states which permit juvenile executions,

[3] The thirty-one states are as follows: the twelve that do not have the death penalty at all; the eleven that had already banned juvenile executions when *Stanford* was issued; the five that did so after *Stanford* and up to the time of the Missouri Supreme Court's opinion (*see Simmons*, 112 S.W.3d at 408); the two that did so by statute after *Simmons* (South Dakota and Wyoming); and Missouri itself.

ten do not list a specific age threshold for the death penalty, and cannot be said to have made a specific legislative judgment that juveniles should be death-eligible. *See* American Bar Association, *Juvenile Death Penalty in Context*, available at <http://www.abanet.org/crimjust/juvjus/resources.html#context> (last visited June 24, 2004).

Although the juvenile death penalty remains in the Missouri statute books, its place there is tenuous at best. *Cf. Atkins,* 536 U.S. at 315 & nn.16-17 (discussing near-passage of bills to ban executions of the mentally retarded in Texas, Virginia and Nevada). A juvenile death penalty ban garnered significant bipartisan support in 2003 through House Bill 255, which was co-sponsored by five Democrats and fourteen Republicans, all but one of whom generally support the death penalty. After a public hearing in January, the chair of the Crime Prevention and Public Safety Committee delayed a vote to pass HB 255 for the full House to consider. Senate Bill 312, also a juvenile death penalty ban, was co-sponsored by four Republican lawmakers, three of whom are death penalty proponents. SB 312 was voted "Do Pass" out of the Senate Judiciary Committee. The juvenile measure became the legislative centerpiece of a larger judiciary bill, which the full Senate never voted upon. Although this legislative effort did not succeed, it was not due to a lack of widespread support. HB 255's lead sponsor, Rep. Larry Crawford, one of the most conservative Republicans in the legislature, stated in a letter to the American Bar Association's Juvenile Justice Center that, "A ban on the juvenile death sentencing enjoys broad, majority support among Missouri citizens and elected officials. HB 255 failed to become law, not because of the legislature's opposition to its concept.

Rather, it stalled due to the appropriate, high priority legislators placed on addressing our state's severe budget crisis and the indifference of a couple of key legislators." Rep. Crawford's letter is attached hereto as Appendix 3.

The next year saw a renewed effort to end the juvenile death penalty in Missouri. Senate Bill 1382 would have raised the minimum age for death-eligibility to eighteen, along with establishing eighteen as the standard age for other rights, privileges and responsibilities under state law. The bill was voted "Do Pass" by the Senate Judiciary and Civil and Criminal Jurisprudence Committee, but the legislative session ended before either chamber could undertake floor debate on the bill. *See* Missouri Senate, *SB 1382: Increases the Age of Majority to Eighteen in Various Statutes*, available at <http://www.senate.mo.gov/04INFO/bills/SB1382.htm> (last visited June 24, 2004).

The juvenile death penalty is generally opposed by Missouri's legislators, even though they have not yet abolished it. In a survey conducted by the Missouri Catholic Conference in 2002, only 13 percent of House and Senate members elected that year expressed opposition to a ban on such executions, while 47 percent expressed support, 28 percent did not respond, and 12 percent expressed no opinion. *See* Appendix 4 (affidavit of Lawrence A. Weber), attached.

Legislative actions aside, contemporary standards of decency are additionally informed by the frequency with which a given class of defendants is sentenced to death by juries and actually executed by states. *See Penry*, 492 U.S. at 331; *Atkins*, 536 U.S. at 316 ("The practice, therefore, has become truly unusual, and it is fair to say that a national consensus has developed against it."). Juries have

been particularly reluctant to sentence juvenile offenders to death. Law Professor Victor Streib has found that "The annual death sentencing rate for juvenile offenses has been declining rapidly and is now much less than half of the annual rate of the late 1990s." Victor Streib, *The Juvenile Death Penalty Today* (March 2004), at 3, 15-22, available at <http://www.law.onu.edu/faculty/streib/juvdeath.pdf> (last visited June 24, 2004). Across the country, just two juveniles were sentenced to death in 2003. Adam Liptak, *Penalty for Young Sniper Could Spur Change in Law*, N.Y. Times, Dec. 25, 2003.

Actual executions are rarer still. Of the 915 inmates executed in the United States since 1976, only twenty-two were juvenile offenders. *See* Death Penalty Information Center, *The Execution of Juveniles in the U.S.*, available at <http://www.deathpenaltyinfo.org/article.php?scid=27&did=203> (last visited June 24, 2004). Of the nineteen states that allow such executions, only seven have actually carried one out in the post-*Furman* era. See American Bar Association Juvenile Justice Center, *Evolving Standards of Decency*, at 1, available at <http://justice.policy.net/cjedfund/resourcekit/ABA_Evolving_Standards_Factsheet_01.30.04.pdf?PROACTIVE_ID=cecefc9c6c6cbc7ccc5cecfcfcfc5cececacfc9c9c6c9c7cec5cf> (last visited June 24, 2004). Of these, only three states, Texas (with 13 executions of juvenile offenders), Virginia (3) and Oklahoma (2) have used this punishment more than once. *Id.* at 2. Only ten juvenile offenders have been executed in the last five years, and Texas alone carried out six of these executions. *See* Death Penalty Information Center, *Age Requirements for the Death Penalty and the Execution of Juveniles*,

available at <http://www.deathpenaltyinfo.org/article.php?scid=27&did=203#execsus> (last visited June 24, 2004).[4] During this same period, only seven juvenile offenders were executed in all other countries of the world – four by Iran, and one each by Pakistan, China, and the Democratic Republic of Congo. *Id.*

The state of Missouri has executed sixty adults since it reinstated the death penalty, but only one juvenile offender. *See Executions, 1989 – present*, available at <http://www.missourinet.com/CapitalPunishment/executions.htm> (last visited June 24, 2004). When Missouri executed Frederick Lashley by lethal injection on July 28, 1993, it had not executed a juvenile offender in sixty-three years. To this date, the state has executed only two such offenders in the last 105 years. *See* Harriet C. Frazier, *The Execution of Juveniles in Missouri, Part One*, J. Mo. Bar. (Dec. 1990), at 634; Harriet C. Frazier, *The Execution of Juveniles in Missouri, Part Two*, J. Mo. Bar. (Jan. 1991), at 49-51. Lashley's execution was the target of substantial opposition throughout our state, including that of major newspapers and even the survivors of victim Janie Tracy. *See* Stephen Kirkland and Tim Bryant, *Man Who Killed Foster Mother is Executed by Lethal Injection*, St. Louis Post-Dispatch (Jul. 28, 1993), at 1B; Editorial, *Missouri Moves Up a Notch*, St. Louis Post-Dispatch (Jul. 30, 1993), at 6B. At present Missouri has no juvenile offenders under a sentence of death, as Christopher Simmons, Antonio

[4] Nine of the last ten juvenile offenders to be executed by Texas were African-American or Hispanic, as are two of the four whom Missouri has sentenced to death since reinstating capital punishment. *See American Bar Association, Juvenile Justice Center, Facts and Figures*, available at <http://www.abanet.org/crimjust/juvjus/dparticles/factsheetfactsfigures.pdf> (last visited June 24, 2004).

Richardson and Heath Wilkins have all obtained relief from the courts.

Nor do Missouri's citizens favor sentencing juveniles to death, a practice that is becoming more unpopular with time. *Cf. Atkins*, 536 U.S. at 316 n.21 ("Finally, polling data shows a widespread consensus among Americans, even those who support the death penalty, that executing the mentally retarded is wrong."). A survey completed in June 2004 showed that although 68 percent of Missourians are strongly or somewhat in favor of the death penalty, only 24.6 percent favor imposing it upon juvenile murderers with 59 percent opposed and 16 percent expressing no opinion. *See* Affidavit of Gary D. Brinker, attached hereto as Appendix 5. Indeed, Missourians' support for juvenile executions has fallen by almost one-third in the last year. A survey in June 2003 found that 34 percent of respondents supported the practice, compared to 24.6 percent today. *See State ex rel. Simmons v. Roper*, 112 S.W.3d 397, 411 & n.18 (Mo. banc 2003); Juvenile Offender Public Opinion Survey, Center for Advanced Social Research, University of Missouri-Columbia (Mar. 2003), available at <http://www.abanet.org/crimjust/juvjus/mopoll.pdf> (last visited June 24, 2004). Of those expressing an opinion in the June 2004 survey, 71 percent opposed the death penalty for a murder committed by a juvenile, with only 29 percent in favor. *See* Appendix 5.

Legislative enactments, the informed opinions of professionals who work with and advocate for troubled youth, the tide of public opinion, and the hesitancy of jurors and states to impose and inflict the ultimate punishment on the young all reflect the same societal consensus: that our standards of decency do not countenance the

death penalty for crimes committed by children. It is past time for the juvenile death penalty to take its rightful place as a lamentable fact of history.

CONCLUSION

WHEREFORE, for all the foregoing reasons, *amicus* Missouri BYE Coalition respectfully requests that this Court affirm the judgment of the Missouri Supreme Court.

Respectfully submitted,

JOSEPH W. LUBY*, Mo. Bar 48951
PUBLIC INTEREST LITIGATION CLINIC
305 E. 63rd Street
Kansas City, Missouri 64113
816/363-2795 • Fax 816/363-2799
Counsel of Record for Amicus

APPENDIX 1

Missouri BYE Coalition Membership Organizations Endorsing *Amicus* Brief

American Friends Service Committee
Amnesty International-Missouri Chapter*
Catholic Services for Children & Youth
Church Women United of Missouri
Citizens for Missouri's Children
Frederick Douglass Coalition
Grass Roots Organizing (GRO)
Institute for Peace and Justice
Jewish Community Relations Council
Let's Start
Mid-Missouri Fellowship of Reconciliation (FOR)
Missouri American Civil Liberties Union (ACLU)**
Missouri Catholic Conference (MCC)
Missouri Chapter, American Academy of Pediatrics
Missouri Citizens United for Rehabilitation of Errants (CURE)
Missouri Juvenile Justice Association
Missouri Association for Social Welfare (MASW)
Missouri National Education Association (MNEA)
Missouri Psychological Association (MOPA)*
Missouri State Conference National Association for the Advancement of Colored People (NAACP)
Missourians to Abolish the Death Penalty (MADP)

---

* Member group of the MO BYE Coalition but unable to sign onto brief due to international group restriction.

** Member group of the MO BYE Coalition, signing onto its national group's amicus brief on behalf of Simmons.

MU Students Against Youth Executions
National Assn. of Social Workers (NASW), MO Chapter
Sisters of St. Joseph of Carondelet
Vision for Children at Risk
Youth Council for Positive Development

APPENDIX 2

IN THE UNITED STATES SUPREME COURT

DONALD ROPER, SUPERINTENDENT, POTOSI CORRECTIONAL CENTER,	)	
Petitioner,	)	**No. 03-633**
v.	)	
CHRISTOPHER SIMMONS,	)	
Respondent.	)	

SWORN AFFIDAVIT OF DAVID KEYS

I, David Keys, after being duly sworn on my oath, state as follows:

1. I am an associate professor of Sociology and Criminal Justice at the State University of New York-Plattsburgh, and I serve as chairperson of the department.

2. I am a co-author of the study entitled "Prevailing Injustices in the Application of the Death Penalty in Missouri (1978-1996)" along with Michael Lenza and Teresa Guess. The study is currently under review for publication.

3. I have re-analyzed the data underlying the study in order to ascertain the charging practices of Missouri prosecutors for homicide suspects under the age of eighteen, as compared to those aged eighteen and older. In doing so, I have concluded that Missouri prosecutors charged seven percent of such defendants under eighteen years of age with capital murder, compared to six percent of defendants who were eighteen

years old or older at the time of the offense. Therefore, those accused of committing homicides when under the age of eighteen were 16.7 percent more likely to be charged with capital murder than were those accused of committing homicides at the age of eighteen or above.

Affiant further saith naught.

/s/ David Keys
David Keys

STATE OF NEW YORK)
) ss.
COUNTY OF CLINTON)

Subscribed and sworn to before me by David Keys, who personally appeared before me and is known to me to be the person described herein and who declared that the aforementioned information is true and correct to the best of his knowledge and that he executed the foregoing affidavit, and acknowledged that he executed the same as his free act and deed.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal this 6th day of July, 2004.

/s/ Candace F. Noel
Notary Public

My Commission Expires: October 12, 2005

APPENDIX 3

LARRY CRAWFORD
State Representative
District 117

HOME OFFICE
P. O. Box 402
California, MO 65018
Tele: 573-796-2023

CAPITOL OFFICE
State Capitol
201 West Capitol Avenue
Jefferson City, MO
85101-6806
Tele: 573-751-2134

[LOGO]

MISSOURI
HOUSE OF REPRESENTATIVES

August 14, 2003

Adam Ortiz
Juvenile Justice Center/ABA
10th Floor
740 15th Street, NW
Washington, DC 20003

Dear Mr. Ortiz:

The purpose of this letter is not to address whether Nanon Williams is guilty or innocent of committing murder in Texas. This letter is written because he was a juvenile at the time of the murder and his case is before the U.S. Supreme Court concerning the Eighth Amendment.

I am the state Representative of the 117th district in Missouri. I am a Republican, representing a rural district and consider myself a conservative. I continue to support capital punishment in principle and this past legislative session, I was the lead sponsor of a bill to allow law-abiding citizens in our state to carry a concealed gun. I was also the lead sponsor of House Bill 255, a measure to

raise the minimum age of death penalty eligibility from 16 to 18.

It seems to me that there indeed is clear majority support, at least among Missourians for such a change in our state law. A ban on juvenile death sentencing enjoys broad, majority support among Missouri citizens and elected officials. HB 255 failed to become law, not because of the legislature's opposition to its concept. Rather, it stalled due to the appropriate, high priority legislators placed on addressing our state's severe budget crisis and the indifference of a couple of key legislators.

I make the above assertions with confidence – it is supported by social scientific data, experience as well as anecdotal evidence. More than 60% of elected legislators in the 2002 election supported raising the age of death penalty eligibility to 18, according to a fall survey of candidates by the Missouri Catholic Conference. A March 2003 survey conducted by the Center for Advanced Social Research at the prestigious University of Missouri-Columbia School of Journalism found that 55% of Missourians opposed the death penalty for offenders under the age of 18, while only 34% supported the current law with 11% undecided. Numerous state and national polls conducted throughout the country over many years are consistent with these findings.

In the legislature, my bill and its Senate companion (SB312) enjoyed strong support, particularly among Republicans, who control both houses of our legislature. SB312's four co-sponsors were all Republicans and HB 255 had 20 co-sponsors – 15 of them Republican. Members of the House Crime Prevention and Public Safety Committee

supported my bill nearly unanimously, but the Chair would not allow members to vote the bill out of committee and onto the House floor. The Senate Judiciary Committee passed SB 312 out of committee 8-1 and urged the full Senate "do Pass" the legislation. A revised version of the bill was passed unanimously by the Senate as an amendment to another judiciary bill, but was gutted out of the joint House-Senate final conference committee report by a couple opponents of the reform measure – though it was supported by a strong majority of legislators. Gov. Bob Holden most likely would have signed into law HB 255/SB 312 according to conversations associates had with key staff members of the governor's staff.

I imagine lawmakers in probably all other states, during the current rocky fiscal climate, have struggled to bring numerous issues to the table that were not budget-oriented – even those which enjoy widespread popular support. Also, regrettably, the will of the legislature (which is, by extension, the will of the public) is at times obstructed by committee chairs and other leaders who are hostile or at least indifferent to certain statutory reforms.

I understand that the US Supreme Court considers state actions in determining a "evolving consensus" in certain matters. My experience in this last session indicates that such a consensus exists in Missouri, although it was unable to be manifested via a change in state law due to circumstances outlined above. During the next legislative session, beginning in January, I intend to again introduce a bill similar to HB 255. Hopefully this time, the will of

the people will be heeded and juvenile death sentencing will become a relic of a bygone era in Missouri.

Respectfully,

/s/ Larry Crawford
Rep. Larry Crawford
District 117

APPENDIX 4

IN THE UNITED STATES SUPREME COURT

DONALD ROPER, SUPERINTENDENT, POTOSI CORRECTIONAL CENTER,	)	
Petitioner,	)	**No. 03-633**
v.	)	
CHRISTOPHER SIMMONS,	)	
Respondent.	)	

SWORN AFFIDAVIT OF LAWRENCE A. WEBER

I, Lawrence A. Weber, after being duly sworn on my oath, state as follows:

1. I am the Executive Director of the Missouri Catholic Conference in Jefferson City, Missouri.

2. In 2002, the Missouri Catholic Conference conducted a survey of candidates for the Missouri Senate and House of Representatives, asking for their views on the juvenile death penalty and other issues of interest to the MCC. Members of the House run for election every two years, while senators serve four-year terms. Thus, in given election year, every House seat and half of all Senate seats are up for election.

3. One of the survey's questions asked respondents whether they supported or opposed the following proposition: "Consistent with federal law, juveniles who commit crimes when they are under the age of 18 should be exempt from the death penalty."

4. Among the representatives and senators who were elected to office in 2002, 47 percent supported the above proposition, 12.7 percent opposed it, 12.2 percent expressed no opinion, and 28.2 percent did not respond to the survey.

Affiant further saith naught.

/s/ Lawrence A. Weber
Lawrence A. Weber

STATE OF MISSOURI)
) ss.
COUNTY OF COLE)

Subscribed and sworn to before me by Lawrence A. Weber, who personally appeared before me and is known to me to be the person described herein and who declared that the aforementioned information is true and correct to the best of his knowledge and that he executed the foregoing affidavit, and acknowledged that he executed the same as his free act and deed.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal this 25th day of June, 2004.

/s/ Alice Watters
Notary Public

My Commission Expires: 10/31/04

APPENDIX 5

IN THE UNITED STATES SUPREME COURT

DONALD ROPER, SUPERINTENDENT, POTOSI CORRECTIONAL CENTER,	)	
Petitioner,	)	**No. 03-633**
v.	)	
CHRISTOPHER SIMMONS,	)	
Respondent.	)	

SWORN AFFIDAVIT OF GARY D. BRINKER

I, Gary D. Brinker, after being duly sworn on my oath, state as follows:

1. I am an associate professor of Sociology at Southwest Missouri State University and serve as the director of the university's Center for Social Sciences and Public Policy Research. I earned a Ph.D. in applied sociology from Baylor University in 1997, an M.A. in sociology from Baylor University in 1994, and a B.A. in sociology from Baylor University in 1991.

2. At the behest of, and through funding provided by, the Ban Youth Executions Coalition of Missouri, the Center for Social Sciences and Public Policy Research conducted a survey to assess the opinions of Missouri residents about various aspects of the death penalty, including the death penalty for criminals who are under eighteen years old at the time of their offenses. Under my direction, the Center contacted 500 Missouri residents, selected at random, between June 1 and June 10, 2004.

The sample size yields a margin of error of plus or minus 4.5 percent.

3. The attached tables are true and accurate excerpts of the survey results. The survey results show, among other things, (a) that 68.4 percent of respondents were strongly or somewhat in favor of the death penalty, 20.8 percent of respondents were strongly or somewhat opposed, and 10.8 percent expressed no opinion; (b) that 24.6 percent of respondents were in favor of the death penalty for a murder committed when the offender was under eighteen years of age, 59.1 percent were opposed to it, and 16.4 percent expressed no opinion; and (c) that, if one's state senator or representative voted to raise the minimum age of Missouri's death penalty to eighteen, 15.8 percent of respondents stated that they would be less likely to vote for him or her, 20.8 percent stated that they would be more likely to vote for him or her, 62.1 percent stated that their vote would not be affected, and 1.4 percent expressed no opinion.

Affiant further saith naught.

/s/ Gary D. Brinker
Gary D. Brinker

STATE OF MISSOURI)
) ss.
COUNTY OF GREENE)

Subscribed and sworn to before me by Gary D. Brinker, who personally appeared before me and is known to me to be the person described herein and who declared that the aforementioned information is true and correct to

the best of his knowledge and that he executed the foregoing affidavit, and acknowledged that he executed the same as his free act and deed.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal this 21 day of June, 2004.

/s/ Deborah A. Underwood
Notary Public

My Commission Expires: 2/15/2005

TABLE 1: In general, what is your view on the death penalty?

	Frequency	Percent of Total Sample	Percent of Those Responding	Cumulative Percent
Strongly Favor	144	28.7	28.9	28.9
Somewhat Favor	199	39.7	39.9	68.7
Somewhat Oppose	56	11.2	11.2	80.0
Strongly Oppose	48	9.6	9.6	89.6
Don't Know/Depends on Circumstances	52	10.4	10.4	100.0
Total	499	99.6	100.0	
Refused	2	.4		
Total	501	100.0		

TABLE 2: Do you support or oppose the execution of a person who was under eighteen years of age when the murder was committed?

	Frequency	Percent of Total Sample	Percent of Those Responding	Cumulative Percent
Support	123	24.6	29.4	29.4
Oppose	296	59.1	70.6	100.0
Total	419	83.6	100.0	
Don't Know/Refused	82	16.4		
Total	501	100.0		

TABLE 3: If Your State Senator or Representative Voted to Raise the Minimum Age for the Death Penalty to 18 Years of age, would you be:

	Fre-quency	Percent of Total Sample	Percent of Those Respond-ing	Cumulative Percent
Less Likely to Vote for Them	79	15.8	16.0	16.0
More Likely to Vote for Them	104	20.8	21.1	37.0
Would Not Affect Vote	311	62.1	63.0	100.0
Total	494	98.6	100.0	
Don't Know/Depends	7	1.4		
Total	501	100.0		

JUL 12 2004

No. 03-633

IN THE

Supreme Court of the United States

DONALD P. ROPER,
SUPERINTENDENT, POTOSI CORRECTIONAL CENTER,

Petitioner,

v.

CHRISTOPHER SIMMONS,

Respondent.

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF MISSOURI

BRIEF OF *AMICI CURIAE* MURDER VICTIMS' FAMILIES FOR RECONCILIATION IN SUPPORT OF RESPONDENT

EMILY SACK
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Counsel for Amici Curiae

Dated: July 12, 2004

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

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LAW REVIEW ARTICLES:

Andrew J. Karmen, *Who's Against Victims' Rights? The Nature of the Opposition to Pro-Victim Initiatives in Criminal Justice*, 8 St. John's J. Legal Comment. 157 (1992) 4n

Lawrence C. Marshall, *The Innocence Revolution and the Death Penalty*, 1 Ohio St. J. Crim. L. 573 (2004) 7n

Lynne Henderson, *Co-Opting Compassion: The Federal Victim's Rights Amendment*, 10 St. Thomas L. Rev. 579 (1998) 4n, 7n

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Susan Bandes, *Empathy, Narrative, and Victim Impact Statements*, 63 U. Chi. L. Rev. 361 (1996) 3n

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Susan Bandes, *When Victims Seek Closure: Forgiveness, Vengeance and the Role of Government*, 27 Fordham Urb. L. J. 1599 (2000) 3n

Victor Streib, *Juvenile Justice or Injustice? The Debate Over Reform*, 14 St. John's J. L. Comm. 371 (2000) 7n

Vik Kanwar, *Capital Punishment as "Closure": The Limits of a Victim-Centered Jurisprudence*, 27 N.Y.U. Rev. L. and Soc. Change 215 (2001-2002) 6n

Vivian Berger, *Payne and Suffering: A Personal Reflection and a Victim-Centered Critique*, 20 Fla. St. U. L. Rev. 21 (1992) 5n

BRIEFS ON RECORD:

Amici Curiae brief submitted in support of Petitioner 3n, 4n, 5n, 7n, 12

OTHER AUTHORITIES:

Murder Victims' Families for Reconciliation, *The Voice*, Spring/Summer 2003 ..... 8n

STATEMENT OF *AMICUS CURIAE* INTEREST

Murder Victims' Families for Reconciliation ("MVFR") is a victim-founded, victim-led national organization of family members of murder victims who oppose the death penalty. MVFR supports programs that address the needs of victims of violence, enabling them to heal and rebuild their lives. MVFR also advocates for programs and policies that reduce the rate of homicide and promote crime prevention and alternatives to violence. MVFR includes people of a wide variety of faiths and belief systems, and its members are geographically, racially, and economically diverse. MVFR works to ensure that our members, notwithstanding their opposition to the death penalty, are treated with equal fairness, dignity, and respect under the victims' rights laws and constitutions of the states.

MVFR seeks to provide the court with the broader perspective of victims' views on the juvenile death penalty. Our perspective is of murder victims' survivors who believe that the execution of 16- and 17-year-old juveniles will not vindicate victims' rights or heal their grief, but only create more pain and loss. MVFR members believe that their loved ones' lives will not be honored by the violation of these juveniles' human rights, but by the prevention of more killing.[1]

---

[1] Murder Victims' Families for Reconciliation files this brief with the consent of counsel for both parties. Pursuant to Supreme Court Rule 37.3, copies of letters of consent to the filing of this brief have been lodged with this Court. Counsel for Murder Victims' Families for Reconciliation authored this brief in its entirety. No counsel for any party authored this brief in whole or in part, and no person or entity, other than Murder Victims' Families for Reconciliation and its members, made monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

Family members of murder victims come from a wide range of backgrounds and hold many different beliefs. Many strongly reject the death penalty despite the unrelenting pain caused by the murderer. For those whose family members were killed by juveniles, the youth of the offender raises the strongest doubts in them about the use of the punishment of death. Awareness of a 16- or 17-year-old's underdevelopment, hope that they might come to understand and take responsibility for their crime, and concern for the families of these youths who kill all come together to form a powerful opposition to the death penalty for juvenile offenders.

Members of Murder Victims' Families for Reconciliation reject the idea of using victims' rights to justify the death penalty for juveniles. Victims' rights must serve all victims, and many victims strongly oppose the death penalty. Furthermore, victims maintain their values and beliefs despite the trauma of a family member's murder. For many, these beliefs include the support for international human rights standards and a powerful sense that justice is not served by executing those who committed their crimes at 16 and 17 years old.

ARGUMENT

I. THE EXECUTION OF JUVENILES SHOULD NOT BE JUSTIFIED IN THE NAME OF VINDICATING VICTIMS' RIGHTS.

There is a prevailing assumption in our society that surviving family members of homicide victims want and need the death penalty in order to feel that justice has been served. In fact victims[2] come to this devastating experience with diverse beliefs, life backgrounds, and needs, and their response to the horror of having a family member murdered is as varied and diverse as the victims themselves. As Susan Bandes has written, "the suffering of crime victims may take many different forms, and it is difficult and dangerous to generalize about what victims experience, what victims want, or what is best for victims."[3]

In its amicus brief in support of the state in this case, the Justice for All Alliance ("JFAA") describes itself as an organization whose purpose is "to support victims of homicide and violent crimes," and "to act as an advocate for change in the criminal justice system to ensure that the rights of the victims and law-abiding citizens are protected."[4] JFAA perpetuates the myth that all victims support the death penalty, and that the state

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[2] Because many state laws and constitutions define family members of homicide victims as "victims," we use the term "victim" to apply to both the homicide victim as well as surviving family members.

[3] Susan Bandes, *Empathy, Narrative, and Victim Impact Statements*, 63 U. Chi. L. Rev. 361, 405 (1996); *see also* Susan Bandes, *When Victims Seek Closure: Forgiveness, Vengeance and the Role of Government*, 27 Fordham Urb. L. J. 1599, 1601 (2000) ("[M]ost of us cannot know how we would react. Therefore, it seems to me we ought to be very slow to judge what any particular individual in that position ought to feel or want.").

[4] Brief of *Amici Curiae* Justice for All Alliance In Support of Petitioner, at 1 (hereinafter "JFAA Brief").

is supporting their rights by executing juveniles: "JFAA has an interest in ensuring that the efforts of the State of Texas to vindicate those [victims'] rights through the administration of its criminal laws are not unduly hampered."[5]

By invoking victims' rights in support of the death penalty, JFAA promotes the inaccurate assumption that all victims believe that the execution of offenders is justice for the crime.[6] Yet many victims who have experienced the loss of a family member to murder have strong beliefs that the death penalty is not the answer to their loss, and in fact can create more pain in their lives.[7] MVFR members have had to confront the issue of the death penalty directly, and have concluded, often through a long and searching process, that execution does not honor the memory of their loved ones, or help to heal their own suffering. It is therefore especially painful to them when their anguish is used in the politics of crime control or law enforcement to add emotional weight to support a policy that they so profoundly oppose.[8]

---

[5] JFAA Brief at 1.

[6] *See* Robert P. Mosteller, *Victims' Rights and the Constitution: Moving from Guaranteeing Participatory Rights to Benefiting the Prosecution*, 29 St. Mary's L. J. 1053, 1054 (1998) (describing the shift of the victims' rights movement "from a focus on victims' participation to an effort to advantage the prosecution.")

[7] *See* Andrew J. Karmen, *Who's Against Victims' Rights? The Nature of the Opposition to Pro-Victim Initiatives in Criminal Justice*, 8 St. John's J. Legal Comment 157, 161 (1992) ("What victims define as their own best interests in 'their cases' often diverges from or directly clashes with the goals of the state.").

[8] *See* Lynne Henderson, *Co-Opting Compassion: The Federal Victim's Rights Amendment*, 10 St. Thomas L. Rev. 579, 583 (1998) ("[T]he experiences and voices of many crime victims simply do not fit current ideologies or the politics of crime. Accordingly, many victims are silenced in the name of giving victims a voice."); Susan Bandes, *Victim Standing*, 1999 Utah L. Rev. 331, 333 (1999) (footnotes omitted) ("[T]he sorts of victim initiatives that have been successful have been those, and only those, that advance the prosecution's own agenda, while preserving the prosecutions's complete freedom from third-party interference."). *See also* Lynne Henderson, *The Wrongs of Victim's Rights*, 37 Stan. L. Rev. 937, 1020 (1985) ("The cooptation of victim's concerns by crime control proponents has created a new mythology of victimization that fails to hear those concerns.").

II. FOCUSING ON THE DEATH PENALTY FOR JUVENILES AS A SOURCE OF EMOTIONAL "CLOSURE" DOES NOT SERVE THE NEEDS OF ALL VICTIMS.

JFAA argues that the desires of victims should have constitutional weight in this Court's interpretation of the Eighth Amendment. In rejecting the Court's holding in *Thompson v. Oklahoma* that the execution of offenders who were 15 or younger at the time of the offense violates the Eighth Amendment, JFAA states that "[t]he Court failed to consider society's moral outrage at petitioner's conduct, the atrociousness of the crime, his moral culpability and *the emotions of the victim's family* in its decision."[9] MVFR rejects this attempt to use victims' emotions to argue for the constitutionality of the death penalty for juveniles. This misuse of victims' emotions is particularly dangerous and irresponsible because it does not accurately reflect the views of all victims. The Court cannot contemplate the emotions of victims' families in weighing whether a punishment is cruel and unusual under the Constitution, and if it were to consider emotions of victims, it would be impossible to fairly and evenly weigh the feelings of all victims.

Victims' emotions cannot justify the use of the death penalty because the legal system's purpose is not to heal emotional wounds. Its more practical and focused goals cannot achieve emotional closure for victims and their families.[10] Meaningful support for

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[9] JFAA Brief at 12 (emphasis added).

[10] Vivian Berger, *Payne and Suffering — A Personal Reflection and a Victim-Centered Critique*, 20 Fla. St. U. L. Rev. 21, 59 (1992) ("The system is not equipped to nurture victims or their representatives.").

victims may come from psychological, religious, or social sources, which can address the individual needs of victims, and without the need to serve a variety of other purposes, such as law enforcement or the protection of defendant rights.

MVFR's opposition to the death penalty, and to the execution of juveniles in particular, is rooted in our members' direct experience of loss and their refusal to respond to that loss with a quest for more killing. Through their own experience, these victims strongly believe that executions are not what will help them heal. MVFR member Robert Hoelscher was seven when his father Ben Hoelscher was murdered in Texas by 17-year-old Gary Sizemore. Robert says, "I would never try to tell another relative of a murder victim to believe something they didn't believe, but for me, healing is not connected to the fate of the perpetrator. Healing is connected to what we build inside of ourselves after the tragedy."

As Vik Kanwar has written, "the requirements of closure and satisfaction are difficult to identify, let alone achieve, through a judicial process competent only to charge, prosecute, and sentence the offender whose crime caused the secondary victim's grief. Courts cannot bring about the ultimate moment of cessation in an infinitely more complicated process of grieving."[11] Sadly, victims who hope that execution will help them heal are often disappointed when the offender's death does not bring the emotional peace or closure that they

[11] Vik Kanwar, *Capital Punishment as "Closure": The Limits of a Victim-Centered Jurisprudence*, 27 N.Y.U. Rev. L. & Soc. Change 215, 241-42 (2001/2002). Lynne Henderson, herself the victim of violent crime, emphasizes the independence of the grieving process from legal developments: "healing takes place whether or not an offender is ever located, much less convicted. Nor does the healing process necessarily end with the successful resolution of a case. Lynne Henderson, *Revisiting Victim's Rights*, 1999 Utah. L. Rev. 383, 418 (1999).

anticipated.[12] Victor Streib has written of his own experience in working with families of murder victims who have been told that the criminal justice system would "fix" their pain:

> I talk with those families years after and I say, "Is it better? This person went to prison or this person was executed. Does this fix it?" No, it is not better. What they wanted was their little girl back. The system could not deliver that. Even worse, it pretended that what they needed was to have us wreak horrible punishments on a few more wretched teenagers, and they would feel better.[13]

JFAA argues that a ruling by this Court permitting the death penalty for juveniles would "respect a person's pride and dignity whose life has been shattered as a result of one's selfish decision to kill."[14] However, for MVFR members, juvenile executions denigrate rather than respect the dignity and individuality of their loved ones. MVFR member Tom Mauser's 15-year-old son Daniel was killed, along with 12 other people, during the shootings at Columbine High School in Littleton, Colorado in 1999. The two students who committed the

[12] Lynne Henderson, *Co-Opting Compassion: The Federal Victim's Rights Amendment*, 10 St. Thomas L. Rev. 579, 595-96 (1998)("Anecdotally, victims who expected the punishment or even execution of the offender would bring them relief, satisfaction, gratification, or an end to the effects of the trauma often find that the effects remain and the 'victory' is a Pyrrhic one."); Lawrence C. Marshall, *The Innocence Revolution and the Death Penalty*, 1 Ohio St. J. Crim. L. 573, 582 (2004) ("There is simply no evidence that executions deliver on their promise of promoting the psychological welfare of murder victims' families.").

[13] Victor Streib, *Juvenile Justice or Injustice? The Debate Over Reform*, 14 St. John's J.L. Comm. 371, 376 (2000).

[14] JFAA Brief at 30.

shootings were 17 and 18, and took their own lives immediately afterward. Tom says, "I have come to learn that, even with the death of my son's killer, even with the pressure of those in society who rush us to 'reach closure,' there is no closure when you lose a child. I believe that a death sentence is merely an attempt to gain revenge, not closure."

Execution of the offender causes some victims to feel implicated in another person's death. Their pain is heightened by the perception that the crime has resulted in yet another loss of life, in which they have played some part. In 1985, MVFR member Patricia Schneider-Zioga's 29-year-old sister Linda Thompson was raped and murdered after being kidnapped from the parking lot of an Oklahoma City shopping mall. The man who murdered her was sentenced to death. Patricia made a statement to the Oklahoma Pardon Board in support of commuting his sentence to life without parole: "I cannot bear that my sister's existence be tied to any more violence. Her murder was in itself extremely violent and it disturbs me deeply that with the prospect of executing her murderer, more violence will be heaped upon already great violence. You must understand that this act cannot bring closure but rather will make my dear sister's death even more painful to me."[15] Many other victims have expressed this sentiment at sentencing and commutation hearings all over the country.

Legal outcomes do not cure the emotional trauma faced by murder victims' families or bring emotional "closure." While we naturally hope to heal these victims' pain, executing juvenile offenders simply cannot serve this purpose.

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[15] *"This Act Cannot Bring Closure,"* The Voice (Murder Victims' Families for Reconciliation), Spring/Summer 2003, at 9.

III. BECAUSE OF THEIR YOUTH AND UNDER-DEVELOPMENT JUVENILE OFFENDERS HAVE PARTICULAR POTENTIAL TO COME TO UNDERSTAND THE IMPACT OF THEIR CRIME, WHICH CAN PROVIDE SUPPORT TO MANY VICTIMS.

Our juvenile justice system is founded on the principle that youths are capable of change and growth. As this Court has recognized many times, while juveniles over a certain age may be tried in the adult criminal system under certain circumstances, this does not dictate that they should be eligible for all punishments available for adult offenders.[16] This is nowhere more relevant than in the case of the death penalty, which ends any hope for rehabilitation.[17] The possibility of the offender's coming to understand the impact of his or her crime is of critical importance to many family members of murder victims. MVFR member Jennifer Bishop-Jenkins' 23-year-old pregnant sister Nancy, and brother-in-law Richard Langert, were murdered in their Illinois home by a 16-year-old who was convicted and sentenced to life in prison. Jennifer says: "His death would bring me nothing. But his remorse, that might come with

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[16] *Thompson v. Oklahoma*, 487 U.S. 815, 826 n.24 (1988) (judgment by state that a juvenile is old enough to be tried in criminal court for serious crimes "tells us nothing about the judgment these States have made regarding the appropriate punishment for such youthful offenders"). *See also id.* at 850 (O'Connor, J., concurring in the judgment) ("[t]here are many reasons, having nothing whatsoever to do with capital punishment, that might motivate a legislature to provide as a general matter for some 15-year-olds to be channeled into the adult criminal justice process. . . . Such reasons would suggest nothing about the appropriateness of capital punishment for 15-year-olds.").

[17] *See Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) ("[T]he penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two.").

time, or even the hope of that possibility, though highly unlikely in our case, would mean a great deal to me. It would mean that he might finally know the full measure of what he took that night. That would be a good thing for me as a victim to know."

Juvenile offenders may offer the most potential for this development as they mature. MVFR member Linda White's daughter Cathy was raped and murdered in Texas by two 15-year-olds. Fifteen years after the murder, after initially supporting the death penalty for juveniles, Linda was able to meet with one of the offenders to confront him with the harm he had done. She says: "It would have been so terrible to execute him. He's had the opportunity to sit there [in prison] and come to grips with what he did, to be remorseful with every bone in his body. I've never seen anybody more remorseful, and he offered us the gift of that."

MVFR member Bill Pelke also experienced the progression of both his own views and the transformation of the juvenile who murdered his family member. In 1986, 16-year-old Paula Cooper became the youngest female on death row in the United States when she was sentenced to death for murdering Bill's 78-year-old grandmother Ruth Pelke in her Indiana home the previous year. Though Bill initially supported the sentence, he felt a powerful change of heart when he came to recognize that his grandmother would have had compassion for Paula and her family. He began to campaign actively to save Paula's life, and in 1989 her sentence was commuted to 60 years in prison, which she is now serving. "Paula is not the same person she was when she committed the crime," Bill says. "After she got off death row, she got her GED and then a college degree, and now she's working for an outside company, from prison, and the money she earns goes into a victims' restitution fund as well as for some prison upkeep. She's now able to give something back. I believe that if they were to execute her now, they

wouldn't be executing the same person who committed that terrible crime."

It is important to many victims to keep that possibility of rehabilitation alive. MVFR member Azim Khamisa's 20-year-old son Tariq was shot and killed in San Diego by 14-year-old Tony Hicks, a teenage gang member. Tony pled guilty to first-degree murder and received a prison sentence of 25 years to life. At his sentencing hearing, Tony made a statement that expressed his regret and shame for his crime. He also wrote a letter to students at his former elementary school, urging them not to do what he did. Azim, who has devoted himself since his son's murder to the prevention of youth violence, says, "Tony's statement, and the letters he writes from prison, have a positive effect on other kids. Think of how many kids he may save. That's going to bring me a lot more healing than if he had gotten the death penalty."

Many family members of victims identify with the family whose child receives a death sentence, adding further reason to oppose the death penalty. Family members, particularly those who have lost a child, often find themselves empathizing with the experience of another grieving family. Regina Hockett's 12-year-old daughter Adriane was murdered in Tennessee by 16- and 17-year-old boys who had gone to school with her own son. Regina says, "I realized they could have been my children. Adriane's father kept saying he wanted the death penalty, and I just looked at him and said, 'That could have been your son.' That's how I'm looking at these boys." Similarly, Bill Pelke, witnessing the anguish of Paula Cooper's grandfather as he watched Paula be sentenced to death, realized his own grandmother — the murder victim — "would not have wanted this grandfather to go through that."

Many victims can be helped to take a step forward in healing if the horror of what was done is acknowledged. Though the state often tells victims that

the death penalty is the ultimate acknow-ledgment of the crime, in fact the death penalty often fails to provide victims with the solace they seek. Instead, victims ask that the state not take away the possibility that the offender himself might acknowledge the devastation he has caused, which can prove to be far more healing for the family.

IV. MEMBERS OF MVFR SUPPORT HUMAN RIGHTS AND OPPOSE THE EXECUTION OF JUVENILES AS A VIOLATION OF INTERNATIONAL HUMAN RIGHTS LAW.

MVFR's human rights mission to abolish the death penalty is based in our core belief that our grief will not be lessened by causing pain to others and that taking a life for a life does not honor a lost loved one. MVFR believes that justice for victims — whose human rights have been so completely violated — does not come from violating the human rights of others.

The world community has spoken loudly and with virtual uniformity in condemning the execution of juveniles as a violation of international human rights law. Victim family members are vocal and active members of this community. MVFR member Milton Jones, whose son Elijah was beaten to death by a 17- and an 18-year-old, states: "It sickens me that my country is willing to violate international human rights standards just so that we can keep sentencing juvenile offenders to death."

It is clear that the United States is not in step with overwhelming international consensus on this human rights issue. If the Court is to consider the needs of victims at all, as the JFAA brief urges, then it must weigh equally the rejection of the juvenile death penalty by many victim family members, which is based in their deeply held beliefs in human rights. An execution of a juvenile carried out in violation of international

standards of human rights does nothing to comfort a grieving family, but only serves to offend their efforts to honor the life of the victim through the highest standards of morality and decency. For the members of MVFR, a death sentence for a juvenile only lowers ourselves as a society to the levels of brutality and violence which brought about our suffering in the first place.

CONCLUSION

Empathy for victims and their families should not be used as a reason to support the executions of those who were 16 and 17 years old at the time of their crime. If this Court is to consider the effect its decision may have on victims' families, it must take into account the diversity of beliefs and needs that exists among those who have suffered the loss of a family member to a juvenile murderer. MVFR members, particularly those whose relatives were murdered by 16- or 17-year-old offenders, do not believe the execution of juveniles will vindicate their rights as victims, help them heal, or honor their loved ones' lives. The death penalty also deprives them of the possibility that these juveniles will come to understand the consequences of their crimes. For MVFR members, who have suffered the devastating effects of murder, these death sentences violate their deeply held beliefs and cause greater pain. Invoking the unbearable sadness of victims to promote the executions of juveniles does not honor their emotions. Rather, it ignores the fact that many victims, while feeling the horror, anger, and sorrow that overwhelm surviving family members after a murder, also hold fervent beliefs in human rights, standards of decency, and an opposition to state killing.

Respectfully submitted,

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IN THE
Supreme Court of the United States

DONALD P. ROPER,
SUPERINTENDENT, POTOSI CORRECTIONAL CENTER,
Petitioner,

v.

CHRISTOPHER SIMMONS,
Respondent.

On Writ Of Certiorari To The Supreme Court of Missouri

BRIEF OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., THE AMERICAN CIVIL LIBERTIES UNION, THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, THE NATIONAL BAR ASSOCIATION, THE NATIONAL URBAN LEAGUE INSTITUTE FOR OPPORTUNITY AND EQUALITY, THE NATIONAL BLACK POLICE ASSOCIATION, THE NATIONAL CONFERENCE OF BLACK LAWYERS, AND THE NATIONAL BLACK LAW STUDENTS ASSOCIATION, AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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Cases:

Alexander v. Louisiana,
405 U.S. 625 (1972) 1n

Atkins v. Virginia,
536 U.S. 304, 317 (2002) 5, 16, 17, 18

Batson v. Kentucky,
476 U.S. 79 (1986) 1n

City of Los Angeles v. Lyons,
461 U.S. 95 (1983) 7n

Furman v. Georgia,
408 U.S. 238 (1972) 1n, 15

Gregg v. Georgia,
428 U.S. 153 (1976) 15

Ham v. South Carolina,
409 U.S. 524 (1973) 1n

Lockett v. Ohio,
438 U.S. 586 (1978) 16, 17

McCleskey v. Kemp,
481 U.S. 279 (1987) 1n

TABLE OF AUTHORITIES (continued)

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Cases (continued):

Miller-El v. Cockrell,
537 U.S. 322 (2003) 1n

State ex rel. Simmons v. Roper,
112 S.W.3d 397 (Mo. 2003) 18n

Swain v. Alabama, 380 U.S. 202 (1965) 1n

Weems v. United States, 217 U.S. 349 (1910) 15-16

Other Authorities:

Anthony Amsterdam *et al.*,
Amicus Brief, Court of Appeals of the State of New York, People of the State of New York Against Darrel K. Harris,
27 N.Y.U. Rev. L. & Soc.Change 399 (2002) .. 11-12

David C. Baldus *et al.*,
How the Death Penalty Works: Empirical Studies of the Modern Capital Sentencing System, 83 Cornell L. Rev. 1638 (1998) 17n

Rick Bragg,
DNA Clears Louisiana Man on Death Row, Lawyer Says, N.Y. Times, Apr. 22, 2003, at A14 . 13n

TABLE OF AUTHORITIES (continued)

Page

Other Authorities (continued):

Bureau of Justice Statistics,
U.S. Dep't of Justice, *Contacts Between Police and the Public: Findings from the 1999 National Survey* 2 (2001), *available at* http://www.ojp.usdoj.gov /bjs/pub/pdf/cpp99/pdf 6n-7n

Jeffrey Fagan & Garth Davies,
Street Stops and Broken Windows: Terry, Race and Disorder in New York City, 28 Fordham Urb. L. J. 457 (2000) 7n

Gwen Filosa,
Ex-Death Row Inmate Home on Bond, Times-Picayune, June 23, 2004 ..... 14n

Samuel R. Gross *et al.*,
Exonerations in the United States 1989 Through 2003 (Apr. 19, 2004), *available at* http://www.law.umich.edu/NewsAndInfo/exonerations-in-us. pdf 11, 17n

Bob Herbert,
Trapped in the System, N.Y. Times, July 14, 2003, at A17 ..... 14n

Marc Mauer,
Race to Incarcerate (1999) 7n

TABLE OF AUTHORITIES (continued)

Page

Other Authorities (continued):

New York City Police Department,
Citywide Stop and Frisk Data: 1998, 1999, and 2000, *available at* http://www.nyc.gov/html/nypd/pdf/pap/stopandfrisk_0501.pdf 6n

Note,
Developments in the Law: Race and the Criminal Process, 101 Harv. L. Rev. 1472 (1988) . 7n

Kenneth B. Nunn,
The Child as Other: Race and Differential Treatment in the Juvenile Justice System, 51 DePaul L. Rev. 679 (2002) 8n

Office of Juvenile Justice and Delinquency Prevention,
Office of Justice Programs, U.S. Dep't of Justice, *Juveniles in Corrections* 12 (June 2004), *available at* http://www.ncjrs.org/pdffiles1/ojjdp/202885.pdf 7, 8n, 9n

Office of Juvenile Justice and Delinquency Prevention,
Office of Justice Programs, U.S. Dep't of Justice, *Minorities in the Juvenile Justice System* 2 (Dec. 1999), *available at* http://www.ncjrs.org/pdffiles1/ojjdp/179007.pdf 8n, 9n

TABLE OF AUTHORITIES (continued)

Page

Other Authorities (continued):

Marc Riedel,
Discrimination in the Imposition of the Death Penalty: A Comparison of the Characteristics of Offenders Sentenced Pre-Furman and Post-Furman, 49 Temp. L.Q. 261 (1976) 12n

David A. Sklansky,
Traffic Stops, Minority Motorists and the Future of the Fourth Amendment, 1997 Sup. Ct. Rev. 271 (1997) 6n

Victor L. Streib,
The Juvenile Death Penalty Today: Death Sentences and Executions for Juvenile Crimes, January 1, 1973 - June 30, 2004, available at http://www.law.onu.edu/faculty/streib/documents/JuvDeathJune302004NewTables.pdf . 10n

Alan J. Tompkins *et al.*,
Subtle Discrimination in Juvenile Justice Decisionmaking: Social Scientific Perspectives and Explanations, 29 Creighton L. Rev. 1619 (1996) 7

United States General Accounting Office,
Death Penalty Sentencing: Research Indicates Pattern of Racial Disparities 2 (Feb. 1990) .. 12n,13n

TABLE OF AUTHORITIES (continued)

Page

Other Authorities (continued):

Bela August Walker,
Note, *The Color of Crime: The Case Against Race-Based Suspect Descriptions*, 103 Colum. L. Rev. 662 (2003) 6

Interest of *Amici Curiae*[1]

The NAACP Legal Defense and Educational Fund, Inc. (LDF), is a non-profit corporation formed to assist African Americans in securing their rights by the prosecution of lawsuits. Its purposes include rendering legal aid without cost to African Americans suffering injustice by reason of race who are unable, on account of poverty, to employ legal counsel on their own. For many years, its attorneys have represented parties and it has participated as *amicus curiae* in this Court, in the lower federal courts, and in state courts.[2]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with more than 400,000 members dedicated to the principles of liberty and equality embodied in the Constitution. It has two regional affiliates in Missouri: the ACLU of Kansas & Western Missouri, and the ACLU of Eastern Missouri. The ACLU has long supported abolition of the death penalty as

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[1]Letters of consent by the parties to the filing of this brief have been lodged with the Clerk of this Court. No counsel for any party authored this brief in whole or in part, and no person or entity other than *amici* made any monetary contribution to the preparation or submission of this brief.

[2]The LDF has a long-standing concern with the influence of racial discrimination on the criminal justice system in general, and on the death penalty in particular. We therefore represented the defendants in, *inter alia, Furman v. Georgia*, 408 U.S. 238 (1972), *McCleskey v. Kemp*, 481 U.S. 279 (1987), *Swain v. Alabama*, 380 U.S. 202 (1965), *Alexander v. Louisiana*, 405 U.S. 625 (1972) and *Ham v. South Carolina*, 409 U.S. 524 (1973) and appeared as *amicus curiae* in *Batson v. Kentucky*, 476 U.S. 79 (1986) and *Miller-El v. Cockrell*, 537 U.S. 322 (2003).

a form of cruel and unusual punishment. It has also long believed that the death penalty is administered in this country in a manner that is both arbitrary and discriminatory. These concerns prompted the creation of the ACLU's Capital Punishment Project, and this case once again brings those concerns into sharp focus. The question of whether juveniles can be executed by the state is thus one of substantial importance to the ACLU and its members.

The National Association of Criminal Defense Lawyers (NACDL) is a non-profit corporation with more than 10,000 members nationwide and 28,000 affiliate members in 50 states, including private criminal defense lawyers, public defenders and law professors. The American Bar Association recognizes NACDL as an affiliate organization and awards it full representation in its House of Delegates. NACDL was founded in 1958 to promote study and research in the field of criminal law, to disseminate and advance knowledge of the law in the area of criminal practice, and to encourage the integrity, independence, and expertise of defense lawyers in criminal cases. NACDL seeks to defend individual liberties guaranteed by the Bill of Rights and has a keen interest in ensuring that legal proceedings are handled in a proper and fair manner. Among NACDL's objectives is promotion of the proper administration of justice.

The National Bar Association, the Nation's oldest and largest bar association of color, was founded in 1925. One of its missions is to promote social justice and equality. Its membership is comprised of a network of 18,000 lawyers, judges and legal scholars who have developed a substantive interest and expertise in the juvenile justice area.

The National Urban League Institute for Opportunity and Equality is dedicated to the pursuit of equal opportunity for

African Americans and concentrates on criminal justice, employment and workforce development, education, housing and economic and community development.

The National Black Police Association (NBPA), which represents approximately 35,000 individual members and more than 140 chapters, is a nationwise organization of African American Police Associations dedicated to the promotion of justice, fairness and effectiveness of law enforcement.

The National Conference of Black Lawyers (NCBL), a legal organizations that employs its members' skills in the movement against racism and for the liberation of African peoples, seeks to protect human rights, achieve self-determination of African communities, and work in coalition to assist to assist in ending the oppression of all peoples.

The National Black Law Students Association (NBLSA), which represents over 6,000 Black students at law schools across the country, endeavors to sensitize the law and legal profession to the ever-increasing needs of the Black community.

All *amici* have a substantive interest in juvenile justice and oppose the execution of juvenile offenders because the sentencing and execution of young offenders is plagued by the same racial bias that each group strives to eliminate. *Amici* believe their perspectives on how race inappropriately influences capital prosecutions against juvenile offenders differs from the immediate concerns of the parties and will be valuable to the Court in appraising the issues presented.

Summary of Argument

This Court has long sought to ensure that the death penalty is administered with channeled discretion, that decisionmakers consider and give effect to relevant factors counseling against death, and that arbitrary factors, such as race, do not dictate the outcome of life or death decisions. By steadfastly guarding these principles, this Court has endeavored to achieve a fair and color-blind death penalty.

Despite this Court's efforts to excise race from the capital punishment calculation, it remains a pivotal factor in the administration of the juvenile death penalty. Decisionmakers — e.g., prosecutors and juries — are legally precluded from relying explicitly on race when exercising their discretion and deciding whether, and to what extent, a defendant's youth weighs against a decision to seek or to impose a death sentence. But in practice, race remains a critical consideration. Specifically, empirical evidence suggests that for offenders of color, decisionmakers discount or altogether eliminate the mitigating value of youth. Thus, currently death-sentenced juveniles as well as juveniles who have been executed are predominantly youth of color.

Empirical evidence likewise demonstrates that young offenders of color are more likely than juvenile defendants generally to be wrongfully convicted, wrongly sentenced to death, and wrongfully subjected to an otherwise flawed adjudication. Much more than a majority of both exonerated juveniles and of exonerated juvenile offenders who had been prosecuted on the basis of false confessions are adolescents of color.

Because race continues to constrain the discretionary consideration of youth as a mitigating factor and increases the risk that juvenile offenders of color will receive a death

sentence, this Court should categorically exclude juveniles from death penalty eligibility.

ARGUMENT

Introduction

The question presented by this case is whether the death penalty is constitutionally disproportionate for juvenile offenders. For the reasons outlined in Respondent's brief and the briefs of numerous other supporting *amici*, the answer to that question is certainly "yes." This brief is being submitted to highlight the fact that race improperly continues to diminish (and often to eliminate) the mitigating value of youth at the various points of discretion in capital prosecutions against juvenile offenders and thereby "undermine[s] the strength of the procedural protections that our capital jurisprudence steadfastly guards." *Atkins v. Virginia*, 536 U.S. 304, 317 (2002).

The process for determining how, if at all, to factor youth into the calculus when deciding whether to charge, prosecute, try and sentence juvenile offenders to death is unavoidably subjective and standardless. Even bifurcated sentencing hearings fail to provide meaningful direction because the sentencer is not provided with any guidelines for determining whether and to what extent a defendant's youth is to be considered a mitigating factor. This absence of structure denies capitally charged juvenile offenders the necessary protection against the influence of improper considerations, such as race, in these critical death penalty decisions. In light of this dilemma, this Court should hold that the death penalty for juvenile offenders is

unconstitutional and disproportionate, and that it violates the Eighth Amendment.

Race in the Criminal and Juvenile Justice Systems

Empirical evidence has repeatedly demonstrated that within the criminal justice system,

> [d]isproportionate burdens on people of color emerge at each point that discretion is used: whether it be the decision to detain a suspect, to make a traffic stop, to search a driver, to shoot at a civilian, to handcuff a suspect, to make an arrest, to prosecute a case, to try a minor defendant as an adult, to increase charges, to plea bargain, to convict, to determine sentence length, or ultimately whether to apply the death penalty or not. Each step in the criminal process increases the discriminatory effect, as well as the perceived image of minorities as disproportionately criminal.

Bela August Walker, Note, *The Color of Crime: The Case Against Race-Based Suspect Descriptions*, 103 Colum. L. Rev. 662, 680-81 (2003) (footnotes omitted).[3]

[3]Among the works cited by the author, see, *inter alia*, *New York City Police Department Citywide Stop and Frisk Data: 1998, 1999, and 2000*, at 1, *available at* http://www.nyc.gov/html/nypd/pdf/pap/stopandfrisk_0501.pdf (citing NYPD records indicating that approximately one half of stop and frisk suspects during 1998-2000 period were black); David A. Sklansky, *Traffic Stops, Minority Motorists and the Future of the Fourth Amendment*, 1997 Sup. Ct. Rev. 271, 313 (1997) (citing data from Florida, New Jersey, and Maryland to show that "minority motorists are pulled over far more frequently than whites"); Bureau of Justice Statistics, U.S. Dep't of Justice, *Contacts Between Police and the Public: Findings from the 1999 National Survey* 2 (2001), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/cpp99/pdf ("During the traffic stop, police were more likely to carry out some type of search . . . on a black (11.0%) or Hispanic (11.3%) than a white (5.4%)."); *id.* at 16 ("Blacks (6.4%) and Hispanics (5.0%) were more likely than whites (2.5%) to be handcuffed."); Note, *Developments in the Law: Race and the Criminal Process*, 101 Harv. L. Rev. 1472, 1495 (1988) ("[A] black citizen today is far more likely than is a nonblack citizen to be shot or seriously injured by a police officer."); *City of Los Angeles v. Lyons*, 461 U.S. 95, 116 n.3 (1983) (Marshall, J., dissenting) ("[I]n a city where Negro males constitute 9% of the population, they have accounted for 75% of the deaths resulting from the use of chokeholds."); Jeffrey Fagan & Garth Davies, *Street Stops and Broken Windows: Terry, Race and Disorder in New York City*, 28 Fordham Urb. L. J. 457, 491 (2000) ("[S]top-to-arrest ratio of blacks (7.3 stops per arrest) is 58.7% higher than the ratio for non-Hispanic whites (4.6)."); Marc Mauer, *Race to Incarcerate* 125 (1999) ("[S]tatistical analysis by the United States Sentencing Commission concluded that, for comparable behavior, whites were being offered plea bargains leading to outcomes falling below the level requiring a mandatory minimum sentence more often than blacks or Hispanics.").

The same phenomenon occurs within the juvenile justice system. In juvenile justice, "discretionary decisionmaking, which necessarily utilizes substantive factors [such as the juvenile's personal and social environment, and his/her situation at home, in the community and in school], serves to facilitate disproportionately adverse outcomes for minorities, particularly African Americans." Alan J. Tompkins et al., *Subtle Discrimination in Juvenile Justice Decisionmaking: Social Scientific Perspectives and Explanations*, 29 Creighton L. Rev. 1619, 1631 (1996). Thus, the U.S. Department of Justice, Office of Juvenile Justice and Delinquency Prevention has found that "[b]lack juveniles are overrepresented at all stages of the juvenile justice system

compared with their proportion to the population."[4] Specifically, African-American children are disproportionately represented in the number of juvenile arrests,[5] are overrepresented among children who are detained,[6] are more likely to have formal delinquency petitions filed against them than their white counterparts,[7] are more likely to have their cases transferred into adult court for prosecution,[8] are "more likely to be placed in public secure

[4]Office of Juvenile Justice and Delinquency Prevention, Office of Justice Programs, U.S. Dep't of Justice, *Juveniles in Corrections* 12 (June 2004), *available at* http://www.ncjrs.org/pdffiles1/ojjdp/202885.pdf [hereinafter *Juveniles in Corrections*].

[5]Kenneth B. Nunn, *The Child as Other: Race and Differential Treatment in the Juvenile Justice System*, 51 DePaul L. Rev. 679, 683-84 (2002) (noting that, in 1997, while black youth accounted for only 15% of the under-eighteen population in the United States, they represented 26% of the juvenile arrests and 31% of the delinquency cases referred for prosecution).

[6]Office of Juvenile Justice and Delinquency Prevention, Office of Justice Programs, U.S. Dep't of Justice, *Minorities in the Juvenile Justice System* 2 (Dec. 1999), *available at* http://www.ncjrs.org/pdffiles1/ojjdp/179007.pdf [hereinafter *Minorities*] ("In 1996-97, while 26% of juveniles arrested were black, [blacks] made up 45% of cases involving detention. Thirty-two percent of adjudicated cases involved black youth, yet 40% of juveniles in residential placement are black. Even recognizing the overrepresentation of black juveniles involved in violent crimes reported by victims (39%), they still accounted for a disproportionate share of juvenile arrests for violent crimes (44%) and confinement (45%).").

[7]Nunn, *supra*, at 685.

[8]*Id.* at 685-86.

facilities, while white youth are more likely to be housed in private facilities or diverted from the juvenile justice system,"[9] are "more likely . . . to be confined behind locked doors,"[10] and "are . . . held in custody longer than white youth."[11]

Race Influences Capital Sentencing Decisions in Cases Involving Juveniles

The above evidence of racial discrimination within the juvenile and criminal justice systems has significant implications for this Court's — and our Nation's — aspiration to achieve unbiased capital sentencing, including in juvenile cases. Decisions whether to charge a juvenile with a capital offense, whether to offer a juvenile a non-death plea bargain, and whether to impose a death sentence on a juvenile offender, take place within the context of a system in which race is deeply ingrained. Because there are no standards governing whether and to what extent youth should factor into these decisions, there is a significant possibility, if not probability, that an offender's race will influence, if not dictate, that determination. This is so even though at every stage at which a decisionmaker must

[9]*Minorities*, *supra*, at 3. *See also Juveniles in Corrections*, *supra*, at 10 (finding that, in 1999, "[m]inorities accounted for 66% of juveniles committed to public facilities nationwide – a proportion nearly twice their proportion of the juvenile population").

[10] *Id.* at 17. *See also Minorities*, *supra*, at 9 ("Secure detention was nearly twice as likely in 1996 for cases involving black youth as for cases involving whites, even after controlling for offense.").

[11]Nunn, *supra*, at 687.

exercise his/her discretion for or against a death sentence (*e.g.*, the point at which a prosecutor files a capital charge and/or when the trial factfinder makes its sentencing determination), the decisionmaker is prohibited from explicitly considering race. The empirical evidence demonstrates that race continues to matter, presumably because decisionmaker(s) in the capital system often fail to exclude conscious or unconscious racial considerations from the subjective, standardless, and unreviewed process of deciding whether an individual defendant's youth is sufficiently mitigating to warrant leniency.

Available data regarding the administration of the death penalty for juvenile offenders supports this conclusion. As of June 30, 2004, there were 72 juveniles under sentence of death in the United States.[12] *Two thirds* are teenagers of color.[13] (In addition, *two thirds* of the victims of the death-sentenced adolescents are white.[14]) *Over half* of the juveniles who were executed since 1973 were black or Latino.[15] And significantly more adolescents of color have

[12]Victor L. Streib, *The Juvenile Death Penalty Today: Death Sentences and Executions for Juvenile Crimes, January 1, 1973 - June 30, 2004*, at 12 tbl.5, *at* http://www.law.onu.edu/faculty/streib/documents/JuvDeathJune302004NewTables.pdf.

[13]*See id.* Twenty-nine of these offenders are African-American, 15 of them are Latino, 1 is Native American and 2 are Asian. *Id.*

[14]*See id.* One Native American, 7 Asians, 8 Blacks, 11 Latinos and 65 whites were the victims of these death sentenced juvenile offenders. *Id.*

[15]*See id.* at 4 tbl.1. Eleven of the twenty-two executed juveniles were African-American and one was Latino. *Id.*

been found to have been *wrongly convicted* of rape and murder than white adolescents: A study of exonerations occurring between 1989 and 2003 revealed that *ninety percent* of exonerated juveniles were African-American or Latino.[16]

> [Although] white defendants account for 34% of all murder exonerations and 27% of all rape exonerations — [they represent] only 14% of *juvenile* murder exonerations, and not a single *juvenile* rape exoneration. A majority of the teenagers arrested for these two crimes are white — 62% of all juvenile rape arrests in 2002, and 46 % of juvenile murder the relevant time period.[17]

This pattern of race limiting (or eviscerating) the mitigating value of youth at the point of prosecutor, judge and/or jury discretion, is consistent with the empirical evidence documenting the fact that race continues to influence capital prosecutions generally. Data reveals that

> [n]one of the statutes upheld by *Gregg* [*v. Georgia*, 428 U.S. 153 (1976)] and its progeny as formally sufficient to cure the *Furman* arbitrariness/discrimination problem have come close to eliminating it. To the contrary, capital sentencing decisions under the so-called "guided discretion" type of statute sustained in *Gregg* . . . have consistently been found to turn primarily on the race of the victim

[16]*See* Samuel R. Gross et al., *Exonerations in the United States 1989 Through 2003*, at 24 tbl.6 (Apr. 19, 2004), *available at* http://www.law.umich.edu/NewsAndInfo/exonerations-in-us.pdf.

[17]*Id.* at 34 (emphasis in original).

and secondarily on the race of the defendant, usually in combination.

Anthony Amsterdam et al., *Amicus Brief, Court of Appeals of the State of New York, People of the State of New York Against Darrel K. Harris*, 27 N.Y.U. Rev. L. & Soc. Change 399, 442-43 (2002) (footnotes omitted).[18] Thus, for example, in 1990, the United States General Accounting Office issued a Report to the Senate and House Committees on the Judiciary evaluating 28 separate studies of the death penalty from various regions of the country.[19] That report concluded that the studies "s.ıow[] a pattern of evidence indicating racial disparities in the charging, sentencing, and imposition

[18]"Looking at the 493 people who had been on death rows in 28 States just before *Furman* was decided and then at the 407 people sent to death rows in the same 28 States during their first three years of operating under post-*Furman* statutes, this study found that the percentage of nonwhite death row inmates had actually risen, from 53% to 62%. . . . Although more than half of the nation's murder victims in the post-*Furman* period were nonwhite, 87% of the victims of the persons condemned to die in States selected to compare mandatory-death-sentence jurisdictions with guided-discretion jurisdictions were white." Amsterdam, *supra*, at 442 n.143 (citing Marc Riedel, *Discrimination in the Imposition of the Death Penalty: A Comparison of the Characteristics of Offenders Sentenced Pre-Furman and Post-Furman*, 49 Temp. L.Q. 261 (1976)); *see also id.* at 443 n.147 (citing articles establishing the fact that race influences the exercise of prosecutorial discr.tion to seek a death sentence or to refuse a noncapital disposition).

[19]United States General Accounting Office, *Death Penalty Sentencing: Research Indicates Pattern of Racial Disparities* 2 (Feb. 1990).

of the death penalty after the *Furman* decision."[20]

Review of one juvenile capital case provides a concrete illustration of how discretionary decisions that may be influenced by race can have a detrimental impact on the capital punishment process in cases involving young defendants.

Ryan Matthews is an African-American young man. In 1999, Ryan Matthews was charged with, convicted of, and sentenced to death for a Louisiana murder he allegedly committed when he was seventeen years old. Ryan Matthews, like the majority of death-sentenced juveniles, was convicted of murdering a white victim. A jury composed of 11 whites and one black found him guilty notwithstanding questionable identification testimony,[21] the absence of physical evidence connecting Ryan Matthews to

[20]*Id.* at 5. The GAO Report concluded that "[i]n 82 percent of the studies, race of victim was found to influence the likelihood of being charged with capital murder or receiving the death penalty, i.e., those who murdered whites were found to be more likely to be sentenced to death than those who murdered blacks." Furthermore, the GAO study found that "[t]he evidence for the race of victim influence was stronger for the earlier stages of the judicial process (e.g., prosecutorial discretion to charge a defendant with a capital offense, decision to proceed to trial rather than plea bargain) than in later stages." *Id.*

[21]Rick Bragg, *DNA Clears Louisiana Man on Death Row, Lawyer Says*, N.Y. Times, Apr. 22, 2003, at A14 ("One witness said he had pulled his car in front of the robber's car and fishtailed for a while so it could not get past him. The witness said that as he was dodging bullets from the gunman, he saw the gunman's face clearly in the rearview mirror. Another witness said she had seen Mr. Matthews briefly pull up the mask in the store while she was in the parking lot.").

the murder, and the inconsistencies between the witness statements and the physical evidence.[22] The same jury sentenced Ryan Matthews to death.

In 2003, after another prisoner bragged of having committed the murder for which Ryan Matthews was convicted, DNA testing was conducted. Those tests revealed that DNA found in saliva and a skin cell which were left on the ski mask worn by the killer did not match the DNA of Ryan Matthews. Instead, it matched the DNA of the bragging prisoner — a convicted drug dealer and murderer. Ryan Matthews' conviction was then vacated and a new trial was ordered. He was released from prison on bond and is now awaiting re-trial.[23]

Given the dearth of credible evidence regarding guilt, it would have been reasonable to expect that Ryan Matthews' youth would, at the very least, have diminished the likelihood that a death sentence would be sought or imposed.

[22]"Witnesses said the masked gunman had dived through the open car window, but the window on the Grand Prix the police believe was the getaway car [the car in which Mr. Matthews was apprehended] had been stuck closed for as long as anyone could remember." *Id.* Additionally,

> [e]yewitnesses had said the gunman in the convenience store was not very tall, perhaps 5-5 or 5-6, and of medium build. Sheree Falgout, who was standing at the register when the proprietor was gunned down, recalled telling the police that the assailant 'was not a large person.' Other witnesses concurred. Ryan Matthews is 6 feet tall.

Bob Herbert, *Trapped in the System*, N.Y. Times, July 14, 2003, at A17.

[23]*See* Gwen Filosa, *Ex-Death Row Inmate Home on Bond,* Times-Picayune, June 23, 2004.

It did not. And, although"[w]e cannot say from facts disclosed in [the] record[] that [this] defendant[] [was] sentenced to death because [he was] black,"*Furman v. Georgia*, 408 U.S. 238, 253 (1972) (Douglas, concurring), it is equally impossible to discount the possibility that race played a constitutionally inappropriate role in the ultimate decision to seek and impose the death penalty. In light of all of the other factors counseling against the execution of juvenile offenders, such individuals should not, in addition, be compelled to face the risk of racial bias in the capital punishment process.

The Only Way to Insure that Race Does Not Determine Whether a Juvenile Defendant Will Receive a Death Sentence Is to Hold that the Death Penalty May No Longer Be Imposed Upon Juveniles

In 1972, this Court announced, in *Furman v. Georgia*, 408 U.S. 238 (1972), that any law which allowed an arbitrary and illegitimate factor such as race to play a role in the administration of the death penalty is unconstitutional. *See id.* at 249-57 (Douglas, J., concurring), 274-77, 293-96 & n.48 (Brennan, J., concurring), 309-10 & n.13 (Stewart, J., concurring), 312-14 (White, J., concurring), 363-66 & n.152 (Marshall, J., concurring). While the death penalty laws have been changed to limit sentencer discretion, *see Gregg v. Georgia*, 428 U.S. 153 (1976), race continues to play an invidious role in the administration of capital punishment for juvenile offenders. The death penalty for such offenders is, therefore, unconstitutional.

The Eighth Amendment's prohibition on excessive sentences requires the "punishment for crime [to] be graduated and proportioned to [the] offense." *Weems v.*

United States, 217 U.S. 349, 367 (1910). In analyzing whether capital punishment is constitutionally proportional for specific categories of offenders, this Court has considered whether the offenders at issue have a characteristic which undermines the criminal justice system's capacity for effective adjudication. Thus, for example, when this Court decided that the Eighth Amendment prohibits the execution of mentally retarded offenders, it held that

> [t]he risk "that the death penalty will be imposed in spite of factors which may call for a less severe penalty,"is enhanced, not only by the possibility of false confessions, but also by the lesser ability of mentally retarded defendants to make a persuasive showing of mitigation in the face of prosecutorial evidence of one or more aggravating factors. Mentally retarded defendants may be less able to give meaningful assistance to their counsel and are typically poor witnesses, and their demeanor may create an unwarranted impression of lack of remorse for their crimes. As *Penry* demonstrated, moreover, reliance on mental retardation as a mitigating factor can be a two-edged sword that may enhance the likelihood that the aggravating factor of future dangerousness will be found by the jury.

Atkins, 536 U.S. at 320-21 (quoting *Lockett v. Ohio*, 438 U.S. 586, 605 (1978)) (footnote omitted).

Youth of color in capital cases face meaningfully identical circumstances. For many juvenile offenders, race devalues evidence that would otherwise support a case for life, encourages the imposition of the death penalty *in spite of* the existence of factor(s) which should call for leniency and ultimately functions as an unlawful impediment to the

proper consideration of mitigating evidence. "When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments." *Lockett*, 438 U.S. at 605.

One specific way in which race increases the likelihood that the death penalty will be imposed on a juvenile offender notwithstanding the existence of significant factors calling for leniency is that youth of color, like offenders with mental retardation, are more likely to offer false confessions. As detailed in other briefs before this Court, this is true for juveniles in general. Empirical evidence reveals, however, that this likelihood of falsely confessing is even greater when the youth at issue is a person of color. The Gross study of rape and murder exonerations between 1989 and 2003, revealed that "*[e]ighty-five percent* of the juvenile exonerees who falsely confessed were African American."[24] Thus, race combines with age to render capitally charged juveniles particularly vulnerable to false confessions and wrongful convictions. The combination thereby enhances "[t]he risk 'that the death penalty will be imposed in spite of factors which may call for a less severe penalty.'" *Atkins*, 536 U.S.at 320-21 (quoting *Lockett*, 438 U.S. at 605).

Additionally, as with mental retardation, the combination of race and youth functions as a "double-edged sword," increasing the likelihood that a sentencer will perceive the defendant as a future danger. When the offender is a young person of color, the jury may be conditioned to think of the offender as "the other" and dangerous (especially if the victim is white).[25] The youthfulness of the offender causes

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[24]Gross, *supra*, at 25 (emphasis added).

[25]*See, e.g.*, David C. Baldus et al., *How the Death Penalty Works: Empirical Studies of the Modern Capital Sentencing*

the jury to think that this defendant is more likely to get out of prison and is, therefore, more likely to pose a future danger to society.[26] Combined these factors undoubtedly cause the jury to lean in favor of the death penalty. Race together with youth is, therefore, a combination which is often perceived by factfinders as aggravating when, in fact, it can and should be perceived as mitigating.

Because youth combines with race in a way that "undermine[s] the strength of the procedural protections that our capital jurisprudence steadfastly guards," *Atkins*, 536 U.S. at 317, and because, as a result, youth of color "in the aggregate face a special risk of wrongful execution," *id.* at 321, it is appropriate for this Court to issue "a categorical rule making such offenders ineligible for the death penalty." *Id.* at 320.

System, 83 Cornell L. Rev. 1638 (1998) (finding that in Philadelphia, Pennsylvania, African-American capital defendants faced substantially increased odds of receiving the death penalty as compared to similarly situated white defendants and that being African American increased the odds of receiving a death sentence to the same extent as did the presence of the additional aggravating circumstances of torture or grave risk of death).

[26]Indeed, in Christopher Simmons' case, the prosecution argued that the jury should consider Mr. Simmons' age as an aggravator instead of a mitigator in that it rendered him more likely to be a future danger to society. *State ex rel. Simmons v. Roper*, 112 S.W.3d 397, 413 (Mo. 2003)

Conclusion

The judgment below should be affirmed.

Respectfully submitted,

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DONALD P. ROPER, Superintendent,
POTOSI CORRECTIONAL CENTER,
Petitioner,

v.

CHRISTOPHER SIMMONS,
Respondent.

On Writ of Certiorari to the Supreme Court of Missouri

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Lowering the Voting Age to 18: Hearings Before the Subcomm. on Constitutional Amendments of the Senate Committee on the Judiciary, 91st Cong., 2d Sess. (1970)	8
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PERIODICALS

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Barrick, Daniel, *Benson to Veto Raising Minimum Death Penalty Age*, Valley News [Vt.], April 24, 2004 13-14

Coyle, Marcia, *Death Row Inmate Back at High Court: Is 5th Circuit Defying a Supreme Court Ruling?*, NATIONAL L.J. June 21, 2004 17

Feld, Barry, *Competence, Culpability and Punishment: Implications of Atkins for Executing and Sentencing Adolescents*, 32 HOFSTRA L. REV. 463 (forthcoming 2004) .. 6, 14, 22, 26

Gillers, Stephen, *Deciding Who Dies*, 129 U. PA. L. REV. 1 (1980) 15

Mello, Michael *"In the Years When Murder Wore the Mask of Law": Diary of a Capital Appeals Lawyer*, 24 VT. L. REV. 583 (2000) 28

Mello, Michael, *Friendly Fire: Privacy vs. Security After September 11*, 38 CRIM. L. BULL. 367 (2003) 17

Note, *Juvenile Curfew Ordinances and the Constitution*, 76 Mich. L. Rev. 109 (1977) 10

Saharsky, Nicole, Comment, *Consistency as a Constitutional Value: A Comparative Look at Age in Abortion and Death Penalty Jurisprudence*, 85 MINN. L. REV 1119 (2001) ... 24

Saunders, Anne, AP, *NH Senate Favors State Ban on Executing Minors*, Valley News [Vt.], Feb. 20, 2004 13

Verhouek, Sam, *Texas Legislator Proposes the Death Penalty for Murderers as Young as 11*, N.Y. Times, April 18, 1998 2

Wallis, Claudia *Secrets of the Teen Brain*, TIME, May 10, 2004 22

TABLE OF AUTHORITIES—Continued

Page

Wilson, Mark, *Convicted Sniper Lee Boyd Malvo Sentenced to Life*, USA Today, March 10, 2004 20

BOOKS AND OTHER MATERIALS

Amnesty International, *Juveniles: The Death Penalty Gives Up On Juvenile Offenders* (July 28, 2003), at http://www.amnestyusa.org/abolish/juveniles 18

BARTOLLAS, CLEMENS, JUVENILE DELINQUENCY (1985) 21

BERNS, WALTER, FOR CAPITAL PUNISHMENT (1979) 20

Institute of Judicial Administration/American Bar Association, Standards Relating to Transfer Between Courts, at Standard § 1.1A and Commentary (1980) 11

Institute of Judicial Administration/American Bar Association, Juvenile Justice Standards, Standards Relating to Juvenile Delinquency and Sanctions, Standard 2.1 and Commentary (1980) 11

Institute of Juvenile Administration/American Bar Association, Juvenile Justice Standards, Standards Relating to Transfer Between Courts (1980) 10

LEHR, DICK AND ZUCKOFF, MITCHELL, JUDGMENT RIDGE: THE TRUE STORY BEHIND THE DARTMOUTH MURDERS (2004) 13

MELLO, MICHAEL DEATHWORK (2002) 28

National Conference of Commissioners on Uniform State Laws, Uniform Juvenile Court Act of 1968, § 2.1(i) (1979) 11

TABLE OF AUTHORITIES—Continued

Page

Streib, Victor *The Juvenile Death Penalty Today: Death Sentences and Executions for Juvenile Crimes, Jan. 1, 1973-April 30, 2004*, available at http://www.law.onu.edu 13, 14, 15, 16, 17, 18, 26, 27

Twentieth Century Fund Task Force on Sentencing Policy Toward Young Offenders, *Confronting Youth Crime* (1978)..... 11

United States Department of Health, Education and Welfare, Welfare Administration, Children's Bureau, Standards For Juvenile and Family Courts (1966)..... 11

United States Department of Justice, National Institute for Juvenile Justice and Delinquency Prevention, Working Papers of the National Task Force to Develop Standards and Goals for Juvenile Justice and Delinquency Prevention, Jurisdiction-Delinquency, vol. IV, at 10-11 (1977) 11

IN THE

Supreme Court of the United States

No. 03-633

DONALD P. ROPER, Superintendent,
POTOSI CORRECTIONAL CENTER,
Petitioner,

v.

CHRISTOPHER SIMMONS,
Respondent.

On Writ of Certiorari to the Supreme Court of Missouri

BRIEF OF THE NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

INTEREST OF *AMICUS CURIAE* [1]

The National Legal Aid and Defender Association (NLADA), a nonprofit corporation, works to support indigent defender services and civil legal assistance to those who cannot afford lawyers. Through its Defender Legal Services division, NLADA provides training, information, and tech-

[1] *Amicus* files this brief with the consent of all parties. Letters of consent have been lodged with the Clerk of the Court. No counsel for a party authored this brief in whole or in part. No person or entity, other than *amicus*, its members, or its counsel made a monetary contribution for the preparation or submission of this brief.

nical assistance to public defender offices and others who provide legal services to indigent criminal defendants. NLADA's American Council of Chief Defenders is a leadership council that is dedicated to promoting fair justice systems and ensuring that citizens who are accused of crimes have adequate legal representation. NLADA has approximately 680 program members, representing 12,000 lawyers, including nonprofit organizations, government agencies, legal aid organizations, and law firms; NLADA also has approximately 1,000 individual members.

NLADA traces its roots to the National Alliance of Legal Aid Societies, which was formed by 15 legal aid societies in 1911. It is the oldest and largest national nonprofit membership association that devotes its resources exclusively to serving the equal justice community.

NLADA is a leading voice in public policy debates on equal justice issues. In pursuit of its efforts, NLADA has filed *amicus curiae* briefs in major constitutional cases before this Court that involve the administration of the criminal justice system. For example, NLADA filed an *amicus* brief in *Thompson v. Oklahoma*, 487 U.S. 816, 839 n.* (1988) (mentioning NLADA brief). Undersigned counsel represented NLADA on the *Thompson amicus* brief.

SUMMARY OF ARGUMENT

This is a brief about line-drawing.

We begin with the premise—accepted by the plurality, concurrence, and dissent in *Thompson v. Oklahoma*—that there is "some age below which a juvenile's crimes can never constitutionally be punished by death." *Thompson v. Oklahoma*, 487 U.S. 815, 848 (1988) (concurring opinion); *id* at 828-29 (plurality opinion); *id.* at 872 (dissenting opinion).

This case presents the question invited by such an assumption: At what age does our culture set the line? The answer is age 18. Throughout the American legal system, age 18 is the

recognized dividing line between adult responsibilities and childhood. Eighteen is the only principled line here as well.

Age 18 is the only *principled* line the Court can draw here. In most states and for most purposes, minority status—defined as lower than age 18—confers a host of legal disabilities. These legal disabilities are powerful objective indicia that in this country age 18 is the line separating childhood from adulthood. Minors are treated differently because minors *are* different. The diverse legal disabilities imposed upon minors are bottomed on the common sense and empirically supported notion that minors lack maturity, judgment, impulse control and experience. Nineteen states now bar the execution of juvenile offenders, and 12 additional states and D.C. bar executions altogether.

Any other line would be arbitrary—and arbitrariness is antithetical to the eighth amendment.

ARGUMENT

I. THE EXECUTION OF A MINOR WHO WAS UNDER THE AGE OF EIGHTEEN AT THE TIME OF THE OFFENSE WOULD VIOLATE EVOLVING STANDARDS OF DECENCY

The Court made clear in *Thompson* that *some* minimum age of susceptibility to the punishment of death must be recognized by a constitutional guarantee that brings to bear evolving standards of decency in fixing the outer boundaries of that criminal sanction. *Thompson*, 487 U.S. at 828-29 (plurality); *id.* at 848 (concurrence); *id.* at 872 (dissent). The problem, here as elsewhere in the evolution of constitutional law, resides in drawing the line. Shall it be 10, 11,[2] 12, 15, 18, 20, 21?

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[2] This is not a hypothetical. *See* Sam Verhouek, *Texas Legislator Proposes the Death Penalty for Murderers as Young as 11*, N.Y. Times, April 18, 1998.

The inevitability of the difficult task of linedrawing is endemic to a Constitution that has chosen not to leave it to the vagaries of isolated juries and trial judges to determine exclusively and irremediably the state of our national conscience. If a constitutional line exists here—and *Thompson* shows that it does—the appropriate place to draw it is at least far clearer in relation to the present subject than in many constitutional areas. The overwhelming concentration of the relevant indicators fix age 18 as the line of full adult responsibility with a clarity that is not merely convenient but compelling when the gravest penal sanction of a society is sought to be exacted of its youth.

A. The Traditional Two-Prong Eighth Amendment Analysis: From *Gregg* to *Coker* to *Ford* to *Thompson* to *Atkins*, and the *Penry/Stanford* Aberration

The cruel and unusual punishments clause of the eighth amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Atkins v. Virginia*, 536 U.S. 304, 311-12 (2002) (quoting *Trop v. Dulles* 356 U.S. 86, 101 (1958)). "The basic concept under lying the eighth amendment is nothing less than the dignity of man." *Atkins*, *id.* (quoting *Trop*, *supra*). Standards of decency evolve and should be "judged not by the standards that prevailed in 1685 when Lord Jeffreys presided over the 'Bloody Assizes' or when the Bill of Rights was adopted, but rather by those that currently prevail." *Atkins*, 536 U.S. at 311.

A claim that capital punishment is unconstitutionally excessive—as applied to a category of crimes or to a category of criminals—has traditionally been tested against a two-prong analysis. The Court's traditional substantive eighth amendment jurisprudence has its genesis in the landmark 1976 case *Gregg v. Georgia*, 428 U.S. 153 (1976). The *Gregg*

Court held capital punishment was not cruel and unusual punishment as applied to the crime of aggravated murder.

In providing analytical content to the facially vague phrase "the evolving standards of decency that mark the progress of a maturing society," the Court in *Gregg* crafted a two-prong test. The first prong was an attempt to identify the objective indicia that reflect the public attitude toward a given sanction. These objective indicia involved examining societal values as reflected in legislative enactments and jury decisions.

The second prong of *Gregg*'s proportionality analysis was subjective. It required the Justices to apply their independent judgment to determine whether the punishment at issue served the legitimate goals of punishment—principally deterrence and retribution. *Id.* at 183.

One year after *Gregg*, the Court applied the same two-prong test to the crime of rape. In *Coker v. Georgia*, 433 U.S. 584 (1977), the Court reaffirmed that objective indicia such as legislative enactments and jury verdicts were the beginning of proportionality analysis, but they were not the end: "The Constitution contemplates that in the end our own [the Court's] judgment will be brought to bear on the question of the death penalty under the eighth amendment." *Id.* at 597; *accord Gregg*, 428 U.S. at 182-83. Hence the importance of the second prong of *Gregg*'s traditional analysis. *Accord Enmund v. Florida*, 458 U.S. 782, 799 (1982) (applying two-prong test to crime of felony murder); *Ford v. Wainwright*, 477 U.S. 399 (1986) (applying two-part test to executing the insane.)

When the Court first addressed the issue of capital punishment for juvenile offenders, the lead opinion applied the traditional two-prong test first articulated in *Gregg*. *Thompson v. Oklahoma*, 487 U.S. 815, 836 (1988). Then, in twin cases decided in 1989, the Court seemed to dramatically constrict the first prong of the traditional two-part analysis,

and the Court appeared to delete the second prong altogether. *Stanford v. Kentucky*, 492 U.S. 361 (1989) (juvenile offenders); *Penry v. Lynaugh*, 492 U.S. 302 (1989) (mentally retarded offenders).

Two years ago the Court returned to its traditional two-prong analysis. In *Atkins v. Virginia*, 536 U.S. 304 (2002), the Court revisited the issue of capital punishment for the mentally retarded and overruled *Penry*. *Atkins*'s analysis more closely resembles that in *Thompson*, *Gregg*, *Coker*, *Enmund*, and *Ford*, than that in *Stanford* and *Penry*. The *Atkins* Court first looked at the objective evidence of legislative intent provided by state legislation barring the death penalty. Then it undertook an independent examination of whether the imposition of the death penalty on the mentally retarded constitutes cruel and unusual punishment under today's evolving standards of decency. *Id.* at 313.

We believe that the traditional two-prong analysis—employed from *Gregg* to *Coker* to *Enmund* to *Ford* to *Thompson*, and reaffirmed in *Atkins*—is correct. *Penry* and *Stanford* were anomalies. Applying the traditional test to mental retardation, the Court overruled *Penry*. Applying the traditional test to the juvenile death penalty, the Court should overrule *Stanford*.[3]

B. The First Prong (Objective Indicia): In Most States and for Most Purposes, Age Eighteen Marks the Bright-Line Boundary Between Childhood and Adult Responsibilities

Throughout the American legal system, age 18 is recognized as the dividing line between adult responsibility and childhood. This bright line is reflected in objective indicia

[3] *See generally In re Stanford*, 536 U.S. 304 (2002) (Stevens, J., joined by Breyer, Ginsburg and Souter, J.J.) (opinion respecting denial of certiorari); Barry Feld, *Competence, Culpability and Punishment: Implications of Atkins for Executing and Sentencing Adolescents*, 32 HOFSTRA L. REV. 463 (forthcoming 2004).

such as the enactments of legislatures, the actual behavior of capital juries, the opinions of respected professional organizations, and the norms of international conduct. *E.g.*, *Thompson*, *supra*; *Atkins*, *supra*; *but see Stanford*, *supra*. Linedrawing here should be "informed by objective factors to the maximum possible extent." *Atkins*, 536 U.S. at 312; *Coker*, 433 U.S. at 592.

The laws and policies discussed in this section reflect an almost universal judgment that minors ought to be treated differently from adults. Generally, there are no exceptions to that judgment. Public officials do not consider requests by especially mature minors to allow them to vote, serve as jurors, or drink alcoholic beverages. As a society, we treat those under age 18 as categorically different from adults. These lines reflect clear distinctions between children and adults, distinctions that require the Court to draw the line at age 18 for the imposition of the death penalty.

1. *Legislative Enactments*

Stanford only considered a single type of legislative enactments: statutes addressing the narrow issue of execution eligibility for juvenile offenders. By contrast, *Thompson* considered the full spectrum of statutes demarking the line between adulthood and childhood. We believe that the inclusive approach of *Thompson* is correct.

The "law has generally regarded minors as having a lesser capability for making important decisions," *Carey v. Population Services International*, 431 U.S. 678, 693 n.15 (1977), and "recognizes a host of distinctions between the rights and duties of children and those of adults." *New Jersey v. T.L.O.*, 469 U.S. 325, 350 n.2 (1985) (Powell, J., concurring). Because of these distinctions, the Court has "sustained legislation aimed at protecting the physical and emotional well-being of youth even when the laws have operated in the sensitive area of constitutionally protected rights." *New York v. Ferber*, 458 U.S. 747, 757 (1982). The "state's interest in

the welfare of its young citizens justifies a variety of protective measures. Because he may not foresee the consequences of his decision, a minor may not make an enforceable bargain. He may not lawfully work or travel where he pleases, or even attend exhibitions of constitutionally protected adult motion pictures. Persons below a certain age may not marry without parental consent." *H. L. v. Matheson*, 450 U.S. 398, 421-22 (1981) (Stevens, J., concurring) (quoting *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 102 (1976) (Stevens, J., dissenting)).

As the plurality observed in *Thompson*, "[i]t would be ironic if these assumptions that we so readily make about children as a class—about their inherent difference from adults in their capacity as agents, as choosers, as shapers of their own lives—were suddenly unavailable in determining whether it is cruel and unusual to treat children the same as adults for purposes of inflicting capital punishment." *Thompson*, 487 U.S. at 825 n.23 (plurality).

Minority status means younger than age 18. Eighteen years is the line selected by Congress and the states in their enactment and ratification of the twenty-sixth amendment to the Constitution governing voting age. Following extensive hearings, both state and federal legislatures agreed to give constitutional significance to age 18 as the time when young people should first be permitted to participate in the most basic civic responsibility of adults in a democracy. *See Lowering the Voting Age to 18: Hearings Before the Subcomm. on Constitutional Amendments of the Senate Committee on the Judiciary*, 91st Cong., 2d Sess. (1970); Sen. Rep. No. 92-26, 92d Cong., 1st Sess. (1971); House Rep. No. 92-37, 92d Cong., 1st Sess. (1971). Eighteen also is the minimum age at which a citizen may be drafted into the armed services as well as the minimum age at which a person may enlist without parental consent. 50 U.S.C.S. app. § 454(a), (c) (2004).

As the plurality noted in *Thompson*, 487 U.S. at 839-848 (Appendices A-F), in most states and for most purposes, a "minor" means one below age 18:

- All states and DC set the age of majority at age 18 or older. Forty-six jurisdictions set age 18 as the age of majority; two jurisdictions set the age at 21, two set it at 19, and one does not set a uniform age of majority. *See* Appendix A (collecting current statutes).
- In no jurisdiction may anyone below the age of 18 serve on a jury. Forty-seven jurisdictions require jurors to be 18 years or older, two require jurors to be at least 19 years and two require jurors to be at least 21. *See* Appendix B (collecting current statutes).
- No jurisdiction has lowered its voting age below 18. *See* Appendix C (collecting current statutes).
- All jurisdictions but four require unemancipated minors to be 18 years old to marry without parental consent. In one jurisdiction, the minimum age is 19; in two states the minimum age is 16; in another jurisdiction, females may marry at age 15 without parental consent. *See* Appendix D (collecting current statutes).
- Thirty-two jurisdictions establish 18 as the age of consent for most forms of non-emergency medical treatment; one state sets the age at 21, one jurisdiction puts the age at 17, two jurisdictions put the age at 16, two set the age at 14, two permit treatment if the minor is able to understand the decision, and eight jurisdictions have no legislation in this area. *See* Appendix E (collecting current statutes).
- Forty-one jurisdictions require a person to be age 18 to receive a driver's license without parental consent; two jurisdictions set the age at 17, while eight set it at 16. *See* Appendix F (collecting current statutes).

- In forty-five jurisdictions, a person must be age 18 to purchase pornographic materials; four jurisdictions set the age at 17, one jurisdiction sets it at 16, and one jurisdiction has no legislation in this area. *See* Appendix G (collecting current statutes).
- No jurisdiction allows legalized gambling by people younger than age 18. Of the forty-eight jurisdictions which permit legalized gambling, 42 set the minimum age at 18, five set it at 21, one sets it at 19. *See* Appendix H (collecting current statutes).
- Of the sixteen jurisdictions which have in recent years set a minimum age for admission to pool halls, twelve states put the age at 18, three set the age at 16, and one puts it at 19. *See* Appendix I (collecting current statutes).
- Of the twenty-nine jurisdictions which have in recent years set a minimum age for the right to pawn property or to sell to junk or precious metal dealers, twenty-five set the age at 18, while three set the age at 16, and one at age 19. *See* Appendix J (collecting current statutes).
- Many localities have juvenile curfew ordinances. The "most common upper age limit" is 18. *See* Note, *Juvenile Curfew Ordinances and the Constitution*, 76 Mich. L. Rev. 109, 140 (1977).

Contemporary legislative attitudes toward minors are reflected further in the development of juvenile justice systems. "Juvenile courts exist because Americans admit to a fundamental difference between children and adults." *See* Institute of Juvenile Administration/American Bar Association, Juvenile Justice Standards, Standards Relating to Transfer Between Courts 1 (1980). Every state has a comprehensive juvenile court system, the principal purpose of which is to rehabilitate and the premise of which is that

minors are not fully responsible for their offenses and therefore should be treated more benignly than their adult counterparts. *See McKeiver v. Pennsylvania*, 403 U.S. 528, 551-52 (1971) (White J., concurring).

Most model standards reflect the judgment of the vast majority of jurisdictions which set age 18 as the boundary of juvenile courts. *See* United States Department of Health, Education and Welfare, Welfare Administration, Children's Bureau, Standards For Juvenile and Family Courts 36 (1966) (Successful experience in these courts over many years has established the soundness of this age level [18 years] of Jurisdiction"); National Conference of Commissioners on Uniform State Laws, Uniform Juvenile Court Act of 1968, § 2.1(i) (1979) (18 years); United States Department of Justice, National Institute for Juvenile Justice and Delinquency Prevention, Working Papers of the National Task Force to Develop Standards and Goals for Juvenile Justice and Delinquency Prevention, Jurisdiction-Delinquency, vol. IV, at 10-11 (1977) (18 years); Institute of Judicial Administration/ American Bar Association, Standards Relating to Transfer Between Courts, at Standard § 1.1A and Commentary (1980) (18 years); Institute of Judicial Administration/ American Bar Association, Juvenile Justice Standards, Standards Relating to Juvenile Delinquency and Sanctions, Standard 2.1 and Commentary (1980) (18 years); Twentieth Century Fund Task Force on Sentencing Policy Toward Young Offenders, *Confronting Youth Crime* 9 (1978) (18 years).

As to capital punishment specifically, the legislative message supports the notion that if an age must be chosen, eighteen is the only *principled* line. Congress—our national legislature—consistently sets age 18 as the minimum age for execution eligibility. The federal death penalty legislation enacted by Congress in the Anti-Drug Abuse Act provides that a sentence of death "shall not be carried out upon a person who is under 18 years of age at the time the crime was

committed." 134 Cong. Rec.-House 1108 (Oct. 21, 1988) (codified at 21 U.S.C. §848(1) (2003)). When federal death penalty legislation was proposed in 1986, no minimum age was specified. An amendment to the bill, setting 18 as the minimum age, passed without recorded disagreement. *See Establishing Constitutional Procedures for the Imposition of Capital Punishment: Report of the Committee on the Judiciary*, 99th Cong., 2d Sess. 30 (1986). In 1994, Congress enacted the Federal Death Penalty Law, adding 50 new federal capital offenses. Again, the minimum age selected by our national legislature was age 18. 18 U.S.C. §2591(a)(2)(D).

At the state level, protection for minors under death penalty statutes has increased dramatically in the past quarter century. A 1961 Associated Press survey of legal possibilities in criminal proceedings involving juveniles showed a much harsher legal environment. *See* New York Times, Jan. 7, 1962, at 81, col. 1. Of forty-one death penalty states at that time, the minimum age for the death penalty was age 7 in sixteen states, age 8 in three states, age 10 in three states and ages 12 to 18 in nineteen states. *Id.* Even at the time of *Stanford* in 1989, 11 states banned the juvenile death penalty.

Since *Stanford*, seven additional states have set the minimum age for execution eligibility at 18 years old. Four did so by statute. *See* South Dakota 2004 Session Laws, S.B. 182 (approved March 3, 2004); Wyoming 2004 Session Laws, ch. 29 (H.B. 5) (approved March 3, 2004); S. 426, 112th Leg., Reg. Sess., Indiana Laws; H.B. 374, 1999 Leg. Sess., 1999 Montana Laws. Two states did so by newly reinstating capital punishment, but only for those offenders who were at least 18 years old. *See* Kan. Crim. Code Ann. § 21-4622 (Vernon 2001); N.Y. Crim Proc. Law § 400.27 (McKinney 2002). One state supreme court held that its capital statute cannot be construed to allow imposition of the juvenile death penalty. *See State v. Furman*, 858 P.2d 1092, 1102-03 (Wash. 1993).

Thus, of the 38[4] death penalty states in the United States, a total of 18 states require a minimum age of 18 for capital punishment. Add the federal civilian and military death penalty statutes, and the number rises to 20—one jurisdiction more than the 18 states *Atkins* identified as prohibiting execution of the mentally retarded. *Atkins*, *supra* at 314-15. If the 12 states and D.C. that bar capital punishment altogether are included, the combined total becomes 30 states that bar juvenile execution—the same number as the 30 states that prohibited execution of the mentally retarded at the time *Atkins* was decided. *See* Victor Streib, *The Juvenile Death Penalty Today: Death Sentences and Executions for Juvenile Crimes, Jan. 1, 1973-April 30, 2004*, available at http://www.law.onu.edu (last visited July 7, 2004) [hereinafter "Streib"].[5]

On March 3, 2004, Governors Mike Rounds of South Dakota and Dave Freundenthal of Wyoming signed into state law bipartisan legislation banning the execution of those who were under age 18 at the time of their crimes. On February 19, 2004, in a state still traumatized by the brutal murders of two Dartmouth College professors, *see generally* DICK LEHR AND MITCHELL ZUCKOFF, JUDGMENT RIDGE: THE TRUE STORY BEHIND THE DARTMOUTH MURDERS (2004), the New Hampshire Senate voted that the state should not execute offenders younger than age 18. *See* Anne Saunders, AP, *NH Senate Favors State Ban on Executing Minors*, Valley News [Vt.], Feb. 20, 2004. On April 23, 2004, the New Hampshire House followed suit. *See* Daniel Barrick, *Benson to Veto Raising*

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[4] New York's highest court recently declared that state's capital statute unconstitutional based on the New York constitution. *See People v. LeVallee*, No. 71, ___ N.Y. ___ (June 24, 2004).

[5] Professor Streib counts Missouri as an age-18 state, based on the lower court's decision in this case. We do not count Missouri. For us, the purpose of this state nose-counting is to demonstrate that state legislatures have set age 18 at the line separating childhood from adulthood. The minimum age in Missouri was set by a state supreme court interpreting the federal constitution.

Minimum Death Penalty Age, Valley News [Vt.], April 24, 2004. The governor vetoed. Many other states have considered similar bills. *See* Feld, *supra*.

Further, as was the case with *Atkins*, the legislative change has all been in one direction: *raising* the minimum age for execution eligibility. No state since *Stanford* has lowered the age from 18 to 17 or 16, even though *Stanford* empowered states to do so. To the contrary, the minimum age has either stayed the same or been raised. Streib, *supra*. The only two states to reinstate capital punishment since *Stanford* set 18 as the minimum age. *Id.*

In any event, statutes authorizing the death penalty for minors are not determinative. The legislatures that permit execution for crimes committed by minors do not deem those same minors sufficiently mature to vote, sit on a jury or engage in a wide variety of adult activities. *See* Appendices A-J. Further, as we will now show, capital statutes authorizing the death penalty for minors have led to only a minuscule number of juvenile death sentences and actual executions. In sum, death penalty legislation alone cannot reveal society's evolving standards of decency. *Accord Thompson*, *supra*; *Atkins*, *supra*; *but cf. Stanford*, *supra*; *Penry*, *supra*.

2. *Jury Determinations and Actual Executions*

In addition to legislative enactments, the "second societal factor the Court has examined in determining the acceptability of capital punishment to the American sensibility is the behavior of juries." *Thompson*, 487 U.S. at 831 (plurality); *accord Atkins*, 536 U.S. at 316. In the three decades since *Furman v. Georgia*, 408 U.S. 238 (1972), the Court has consistently looked to the pattern of jury verdicts in support of a conclusion about the death penalty's constitutionality, either generally or for particular crimes or offenders.

Thus, the Court, while considering legislation as one measure of society's evolving standards of decency, still looks

beyond those indicators to learn whether they are accurate. There is a good reason to do so:

> Each lawmaker confronts capital punishment abstractly. No life depends on her vote. Legislative response tells us the degree to which we are willing to have laws permitting execution, but sentencing and execution tell us the degree to which we are willing to carry them out. A statute, furthermore, is static. It remains until changed. As public opinion shifts, older statutes become less reliable indicators of current values. Forces influence legislators that do not affect jurors. A legislator may believe, for example, that death penalty proponents in his constituency are more likely than its opponents to be single- issue voters or are more likely to organize against him, if he opposes capital punishment, than will opponents if he supports it. A constituency's willingness to vote based on a single issue and its degree of organization likely influence a lawmaker's decision and may skew the degree to which the pattern of legislation reflects community sentiment. Of course, legislative action may accurately reflect community sentiment on the acceptability of the death penalty, either generally or in classes of cases. But without a pattern of jury response, we cannot know whether this is true or whether, instead, various political factors have combined to obscure the community view. The jury, because it is so directly involved, is needed to avoid guessing wrong.
>
> Stephen Gillers, *Deciding Who Dies*, 129 U. PA. L. REV. 1, 72-73 (1980).

A total of 227 juvenile death sentences have been imposed since 1973, only three percent of the approximately 7,445 death sentences imposed for offenders of all ages. *See* Streib, *supra* at 8. Of these 227 juvenile death sentences imposed in the modern era, only 72 remain currently in force. *Id.* For the 155 juvenile death sentences finally resolved either by reversal or execution, the reversal rate is 86% (133 of 155). *Id.* Only 14% (22 of 155) resulted in execution. *Id.*

Since 2000, the juvenile death sentencing rate appears to have declined significantly. Seven such sentences were imposed annually in 2000 and 2001—half the typical rate in the preceding six years. *Id.* In 2002, only four juvenile death sentences were imposed. *Id.* Only two such sentences were imposed in 2003, and only one was imposed in the first five months of 2004. *Id.*

In short, capital juries rarely sentence juvenile offenders to death. Actual juvenile executions have become rarer still. In *Atkins*, this Court found persuasive the fact that execution of the mentally retarded had become truly unusual. Many states that nominally had the death penalty on their books no longer imposed it at all or had never imposed it on a mentally retarded person, and only a total of five persons known to be mentally retarded had been executed in the United States in the thirteen years following the Court's decision in *Penry*. *See Atkins*, 536 U.S. at 316.

The practice of executing those under 18 has become similarly uncommon today. Although twenty-two states theoretically permit the death penalty for juveniles, only six (Missouri, Texas, Virginia, Georgia, Oklahoma, and Louisiana) have actually executed a juvenile offender since *Stanford* was decided fifteen years ago. Streib, *supra*, at 3-4. Of these six states, only three have executed juvenile offenders since 1993—Texas, Virginia, and Oklahoma. *Id.* at 4. Louisiana last executed a juvenile offender in 1990, Georgia in 1993. *Id.* at 3. Missouri executed Frederick Lashley in 1993. That is the only officially recorded execution of a juvenile offender in Missouri since the state took over executions from Missouri's counties in 1937.

Perhaps most telling is that, while at least 366 juvenile offenders have been executed in this country since 1642 (when the first juvenile offender execution occurred), only twenty-two of the 366 were carried out during the current era (1973-2004). *Id.* Of these twenty-two executions, Texas,

Virginia, and Oklahoma together account for eighty-one percent of the juvenile executions; Texas alone accounted for 59 percent.[6] *Id.* at 5. Although Alabama, Arizona, Arkansas, Delaware, Idaho, Kentucky, Mississippi, Nevada, Pennsylvania, South Dakota, Utah, and Wyoming all theoretically permit the death penalty for 16-year-olds, and while Florida, New Hampshire, and North Carolina theoretically permit it for 17-year-olds, none of these states has executed a juvenile since the death penalty was re-established in 1976. *Id.* at 3-4, 6. All but South Dakota and New Hampshire, however, have executed other offenders during that period. Indeed, even where juries have imposed a death sentence on a juvenile since the reinstatement of the death penalty in 1976, its application has consistently been reversed by the courts on a variety of grounds, making South Carolina the only other state (other than Texas, Louisiana, Missouri, Georgia, Virginia, and Oklahoma) to carry out a juvenile execution since 1976. *Id.* at 3.

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[6] Texas and Virginia ought not be allowed to skew the Court's survey of our national standards of decency. The Court should treat Texas and Virginia as social scientists would treat outliers in a statistical analysis—statisticians always clip the outliers. Federal constitutional law in this area should be broad and non-regional.

Further the Texas and Virginia execution rates should be clipped statistically, because both states have particularly dysfunctional systems of capital punishment. Both states grossly underfund capital defense at both the trial and appellate level. Neither the Virginia Supreme Court nor the Texas Court of Criminal Appeals provide meaningful state appellate court review. Neither the Fifth Circuit not the Fourth Circuit provide meaningful federal habeas appellate review. *Cf. Tennard v. Dretke*, No. 02-20038, 542 U.S. ___, (U.S. June 24, 2004) (sharply-worded reversal of Fifth Circuit); *Banks v. Dretke*, No. 02-8286, 542 U.S. ___, 72 U.S.L.W. 4193 (U.S. Feb. 24, 2004) (same); Marcia Coyle, *Death Row Inmate Back at High Court: Is 5th Circuit Defying a Supreme Court Ruling?*, National L.J., June 21, 2004 (discussing *Miller El v. Dretke*, No. 03-9659 (certiorari granted, June 28, 2004); Michael Mello, *Friendly Fire: Privacy vs. Security After September 11*, 38 Crim. L. Bull. 367, 393-94 n.53 (2003) (discussing Fourth Circuit).

More mentally retarded persons than juveniles have been executed, in more states, since the death penalty was reinstated in 1976. As *Atkins* noted in regard to the mentally retarded, in light of the small number of executions of juvenile offenders carried out in the last decade, legislatures in states with a juvenile death penalty may have seen little reason to pass legislation barring it. *Atkins*, *supra* at 316. Juveniles are so seldom executed that, other than perhaps in Texas, Virginia, and Oklahoma, the death penalty for juveniles has become so truly unusual that its potential application is more hypothetical than real.

3. *Other Nations: Allies in the War on Terrorists*

That it would offend civilized standards of decency to execute a person who was less than 18 years old at the time of the offense also finds support in the views that have been expressed by "other nations that share our Anglo-American heritage." *Thompson*, 487 U.S. at 830 (plurality); *see also Atkins*, 536 U.S. at 313; *but see Stanford*, 492 U.S. at 369 n.1.

The domestic legislative evidence that age 18 is the appropriate boundary between minority and adult responsibility coincides with international law. The international rejection of the juvenile death penalty was already strong at the time of *Stanford*. Today, the United States stands alone: The U.S. is the only country in which the execution of those under 18 is officially sanctioned, and the only country that has not signed the UN's Convention on the Rights of the Child, which prohibits the practice. *See* Amnesty International, *Juveniles: The Death Penalty Gives Up On Juvenile Offenders* (July 28, 2003), at http://www.amnestyusa.org/abolish/juveniles. Of the last seven juvenile offender executions, five occurred in the United States. *See* Streib, *supra*, at 7.

Perhaps more importantly, the September 11, 2001 terrorist attacks occurred since *Stanford* was decided. We are now a nation at war. The reality of war affects constitutional

adjudication. *E.g.*, *Hamdi v. Rumsfeld*, No. 03-6696, 542 U.S. ___ (U.S. June 28, 2004); *Rasul v. Bush*, No. 03-334, 542 U.S. ___ (U.S. June 28, 2004).

The United States cannot win the war against terrorists without the active cooperation of other nations. After September 11, the good opinion of the world is no longer a matter simply of U.S. pride; it is a matter of national self defense and survival. Whether we like it or not, most of the rest of the world finds capital punishment barbaric, the juvenile death penalty more barbaric still. The geopolitical reality is that elimination of our juvenile death penalty would increase worldwide respect for and cooperation with America as we lead the global war on terror. As we lead the war on terrorism, it will be essential that our domestic standards of law and morality match or exceed the standards of our allies in this war.

C. The Second Prong (the Court's Independent Judgment on Deterrence and Retribution): Establishing a Bright-Line Age Limit of 18 Years Will Not Undermine Deterrence or Retribution, Because the Reasons For Treating Minors Differently From Adults Apply With Special Force Here, Since the Developmental Differences Between Adolescents and Adults Diminish the State's Interest in Inflicting the Death Penalty on Minors

1. *The Law Treats Children Differently Because Children* Are *Different*

The previous section documented ways in which the law treats children differently from adults. This section discusses the reason: The law treats children differently because children *are* different. Specifically, children are different in ways directly connected to the goals of capital punishment—retribution and deterrence. *See Thompson*, *supra*; *but see Stanford*, *supra* (no discussion of deterrence or retribution).

The *Thompson* plurality explained what every parent worth her salt knows from experience: "Less culpability should attach to a crime committed by a juvenile. . . . Inexperience, less education, and less intelligence make the teenager less able to evaluate the consequences of his or her conduct while at the same time he or she is much more apt to be motivated by mere emotion or peer group pressure." *Thompson*, *supra* at 835.

2. *Retribution and Deterrence*

The Court has said that retribution—the expression of society's outrage at particularly offensive conduct—is a legitimate penological goal of capital punishment. *Thompson*, 487 U.S. at 836 (plurality); *Spaziano v. Florida*, 468 U.S. 447, 461-62 (1984); *Enmund*, 458 U.S. at 800-01; *Gregg*, 428 U.S. at 183; *Atkins*, 536 U.S. at 319; *but see Stanford*, *supra* (no discussion of retribution); *Penry*, *supra* (same).

As the *Thompson* plurality observed, the philosophical premises of retribution fail when applied to minors. *Thompson supra* at 834-35. The morality of the anger which fuels the desire for retribution is based on the killer's violation of the social compact. Society has entrusted its citizens with rights, one of which is freedom, and the murderer has grossly abused that freedom. WALTER BERNS, FOR CAPITAL PUNISHMENT 155 (1979). The fallacy of this retributive argument as it applies to minors is precisely that society does *not* entrust minors with such freedom. States do not trust their minors to vote, sit on juries or engage in a wide variety of adult activities.

It is no accident that even in an era in which the public perceives a significant increase in juvenile crime and where public support for capital punishment is overwhelming, juries almost never vote to execute minors—even for especially hideous and high-profile crimes. *See, e.g.*, Mark Wilson, *Convicted Sniper Lee Boyd Malvo Sentenced to Life*, USA Today, March 10, 2004. Many jurors, given the task of ex-

pressing the common sense judgment of the community, recognize that adolescents are developmentally distinct from adults, that adolescents grow up, and that young people are uniquely capable of being rehabilitated. Juries recognize that it is unrealistic and inhumane to treat young offenders as if they have fully mature judgment and control.

Thompson recognized that, in refusing to vote for the ultimate retribution for minors, juries understand the common sense and empirically supported assumption that minors lack the maturity, experience, sophistication and judgment necessary to make many important decisions. "Inexperience, less education, and less intelligence make the teenager less able to evaluate the consequences of his or her conduct while at the same time he or she is much more apt to be motivated by mere emotion or peer pressure than is an adult. The reasons why juveniles are not trusted with the privileges and responsibilities of an adult also explain why their irresponsible conduct is not as morally reprehensible as that of an adult." *Thompson*, 487 U.S. at 835 (plurality). "Children, by definition, are not assumed to have the capacity to take care of themselves." *Schall v. Martin*, 467 U.S. 253, 265 (1984).

Similarly, *Thompson* acknowledged, exempting juveniles from capital punishment would not undermine the deterrent effect of capital punishment. The "death penalty has little deterrent force against defendants who have reduced capacity for considered choice." *Skipper v. South Carolina*, 476 U.S. 1, 13 (1986) (Powell, J., concurring). The *Thompson* plurality noted that adolescents are less likely than adults to calculate consequences rationally; this, indeed, is the premise underlying the states' guardianship and protection of minors. It is unlikely that cold, rational calculation of risks and consequences is involved when minors commit crimes. *Thompson*, *supra* at 837-38; *see also* CLEMENS BARTOLLAS, JUVENILE DELINQUENCY 102 (1985).

The *Thompson* plurality grounded its analysis of retribution and deterrence in research conducted by behavioral psychologists. At the time of *Thompson* and *Stanford*, developmental psychologists had long reported differences between the thinking and behavior of children, adolescents, and adults. The psychological literature remains solid on this score. *See* Feld, *supra*.

However, recent neuroscience research since *Stanford* suggests that these behaviors have *organic* roots—in brain development, biological maturation, and intellectual functioning. *See generally* Feld, *supra* at section III. A. 4 (summarizing studies). In other words, a "hard-science explanation may exist for the soft-science observations of social scientists. Neurobiological science suggests that the human brain does not achieve physiological maturity until the early twenties, and that adolescents simply do not have the same physiologic capability as adults to make mature decisions or to control impulsive behavior." *Id.*; *see also, e.g.*, Claudia Wallis, *Secrets of the Teen Brain*, Time, May 10, 2004 (cover story).

The unifying narrative theme of the social science materials cited in *Thompson*, and of the neuroscience research conducted since *Thompson* and *Stanford*, provide empirical support for the common sense idea that adolescents act differently because they *are* different. These differences go directly to the retributive and deterrent justifications for capital punishment.

D. A Bright-Line Rule Is Appropriate Here, Because There Is No Viable Basis for Distinguishing Among Minors for Purposes of Administration of the Death Penalty, and Because a Bright-Line Rule Would Best Serve the Principles of Federalism

The quandary of line-drawing among minors is, of course a dilemma that the Court has faced on prior occasions. In numerous cases, in numerous factual contexts, the Court has

consistently sounded a single, overarching theme: that minors—simply by virtue of their status as minors—can be deprived of the rights and privileges of adults. The Court's decisions sanctioning legal disabilities for minors treat juveniles as a coherent class, and establish the age of majority as the demarcation between the period of childhood and the period of adulthood. *E.g.*, *Ginsberg v. New York*, 390 U.S. 629 (1968); *Parham v. J.R.*, 422 U.S. 584 (1979); *Schall*, *supra*.

It is instructive to consider the context in which the Court has previously decided questions of juvenile law. Typically, the question presented is whether a certain minor, or class of minors, is sufficiently mature or sophisticated to be treated as an adult and freed of a statutory or administrative restriction that affects all young people. The Court has repeatedly rejected such attempts to draw distinctions between subgroups of minors, and instead has relied on generalizations about the unique nature of childhood and the universal characteristics of children, to treat minors as a single coherent class. *E.g.*, *Schall*, 467 U.S. at 265 ("[c]hildren, by definition, are not assumed to have the capacity to care for themselves"); *Prince v. Massachusetts*, 321 U.S. 158, 168 (1944) (upholding the state's right to restrict a minor's employment opportunities, because "[t]he state's authority over children's activities is broader than over like actions of adults").

1. *The Abortion Cases*

The series of decisions addressing the privacy rights of a young woman to an abortion constitute the only factual context in which the Court has tolerated case-by-case determinations on the basis of the relative maturity or immaturity of individual youths. *E.g.*, *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (upholding parental consent requirement for immature minors); *Planned Parenthood of Missouri*, *supra*; *Bellotti v. Baird*, 443 U.S. 622 (1979); *H.L. v. Matheson*, *supra*. However, the Court has permitted such case-by-case

determinations only in order to avoid irrevocable harm. In *Bellotti*, the Court recognized that "considering her probable education, employment skills, financial resources, and emotional maturity, unwanted motherhood may be exceptionally burdensome for a minor." 443 U.S. at 642. Accordingly, the Court struck down a parental veto statute that would have imposed the "grave and indelible" consequences of "unwanted motherhood" upon mature minors who were capable of rationally considering the alternatives. *Id.*

A question is sometimes raised as to how a young teen can have the maturity to decide whether or not to have an abortion and yet not be mature enough to be subject to the death penalty. The broadest response to the question is that developmental maturity is always conditional. A teen who is considered able to handle the question of abortion may not be mature enough to act as a guardian or to serve in public office. Contemplating the future consequences of bearing (or not bearing) a child is inherently very different from foreseeing the consequences of killing another person—an act that for a young teen can hardly be labeled a *decision* in an adult sense, especially in light of what has been learned recently about the functioning of the adolescent brain. *See* Nicole Saharsky, Comment, *Consistency as a Constitutional Value: A Comparative Look at Age in Abortion and Death Penalty Jurisprudence*, 85 MINN. L. REV 1119 (2001).

The response from a jurisprudential perspective is even clearer. From *Furman* and *Gregg* to *Thompson* and *Atkins*, the mandate is fairness, and the calculus is consistency. The eighth amendment is offended by the absence of either. Cases raising the issue of the autonomy interest of a pregnant minor *vis a vis* other protectable interests under law do not concern punishment, let alone cruel and unusual punishment. The bright-line that is so essential in establishing consistent classifications under the death penalty scheme is, indeed, counterproductive in the teen abortion/parental notification

context, since the focus is on individual maturity, rather than legal presumptions flowing from one's age. See *Bellotti v. Baird*, 443 U.S. 622, 647 (1979). In sum, teen applicants for autonomy in making decisions about abortion are not even to be compared with each other, and even less with minors facing the death penalty.

Unlike the prior cases involving minors' rights, where an individual minor (or a litigant acting on behalf of the minor) sought to divide artificially the general class of minors into subclasses of mature and immature minors for the sake of expanding mature minors' rights, here it is the state that is asking the Court to engage in such artificial case-by-case decision making. The state asserts, in effect, that certain minors are sufficiently mature and sophisticated so as to fall outside the general category of youth and be subjected to the perquisites (here, the penalties) of adulthood.

The case-by-case decision making urged by the state cannot be squared with the Court's prior decisions in the area of minors' rights. There can be no justification for employing a one-way analysis that forbids case-by-case decision making for the sake of *expanding* minors' rights while employing that very same form of decision making for the sake of *extinguishing* the greatest of all rights, the right to life.

2. *The Risk of Error*

We understand that different people mature at different rates: "17½ -year-olds vary widely." *Yarborough v. Alverado*, No. 02-1684, 542 U.S. ___, 72 U.S.L.W. 4415, 4420 (U.S. June 1, 2004) (O'Connor, J., concurring). There is nothing magical about the 18th birthday.

Establishing a bright-line at age 18 may mean that some especially mature minors might escape the death penalty. However, trials are imprecise instruments, and "maturity" is a slippery concept at best—which means that, under the status quo, some especially immature minors are sentenced to death.

That is one message behind the 86% reversal rate in juvenile capital cases. *See* Streib, *supra* at 8. Both the status quo and the bright-line rule we advocate carry risks of error. We believe that the risk of error ought to be allocated in favor of life over death. *See* Feld, *supra* at section IV.

But focusing on offender maturity and blameworthiness obscures a larger societal truth: This is not just about who the *killers* are. This is also about who *we* are as a society. The controlling eighth amendment inquiry turns on our nation's standards of decency. Perhaps some 17-year-olds are mature enough to die; perhaps some even deserve to die. But we should still choose not to kill them. America should not execute people who were children—so defined by a wide constellation of objective indicia—when they committed murder. We should be better than that.

3. *Federalism: A Bright-Line Rule is Less Injurious to Principles of Federalism*

Federalism also supports a bright-line rule. The government argues that states should be free to set the execution eligibility age limit to lower than age 18, that establishing a bright-line rule at age 18 would offend principles of federalism. But a bright-line age limit would be less injurious to principles of federalism than the status quo today. Today, we know that the Constitution sets *some* minimum age for execution eligibility. We just do not know what that age might be. This vagueness matters: The reversal rate for juvenile death sentences is 86% (133 of 155). *See* Streib, *supra* at 8. Nearly nine out of ten juvenile death sentences have been reversed. Many of those reversals have been at the hands of federal habeas courts. The status quo, not a bright-line age limit of 18, constitutes an unwarranted federal intrusion into state control of its criminal procedure.

An absolute age limit of age 18 would be less of an intrusion on state criminal processes, because it would be clear-cut, in contrast to the current vagueness. Such vagueness

compels continual intervention by the federal courts into state criminal proceedings—not on the basis of applying a concrete principle but by the corrosive and irritating process of case-by-case review. The vagueness of the status quo has not meant, and will not mean, *less* federal intervention in state criminal prosecutions than would be the case if the eighth amendment were construed to establish a bright-line age limit of 18. The status quo means *more* federal intervention on a case-by-case basis—and the relations between federal and state courts would suffer from it. A bright-line age limit of 18 would be a more appropriate adaptation of the eighth amendment to the demands of federalism.

Finally, the practical implications with respect to persons already on death row do not militate against overruling *Stanford* and establishing a bright-line at age 18. The 72 juvenile offenders currently on death row constitute only two percent of the total death row population of approximately 3,500. *See* Streib, *supra* at 11. Since 1973, almost all actual executions have been of adult offenders, so the overall execution rate would be largely unaffected even if the Court were to establish a bright-line at 18. *See* Streib, *supra* at 5. For example, Texas has executed 321 persons in the current era, only 13 (four percent) of whom were juveniles. *Id.* Outside of Texas the rest of the United States has executed 588 persons in the current era, only 19 (1.5 percent) of whom were juvenile offenders. *Id.*

CONCLUSION: "Being Able to Stay Outside and See the Moon and Stars. . . ."

The inevitability of the difficult task of linedrawing is endemic to a Constitution that has chosen not to leave it to the vagaries of isolated juries and trial judges to determine exclusively and irremediably the state of our national conscience. If a constitutional line exists here—and *Thompson* shows that it does—the appropriate place to draw it is at least far clearer in relation to the present subject than in many constitutional

areas. The overwhelming concentration of the relevant objective indicators fix age 18 as the line of full adult responsibility with a clarity that is not merely convenient but compelling when the gravest penal sanction of a society is sought to be exacted of its youth.

Amid the legal arguments and counter arguments made in cases such as this, it is easy to lose track of the truth that these cases affect real lives. Death row prisoners are real people. Their murder victims are real people.

During the 1980s, undersigned counsel represented a Florida death row prisoner named Paul Magill. *See* MICHAEL MELLO, DEATHWORK 148-161 (2002); Michael Mello, *"In the Years When Murder Wore the Mask of Law": Diary of a Capital Appeals Lawyer*, 24 VT. L. REV. 583, 596-97 n.67, 1026-27, 1096-1124, 1148-50 (2000). Magill was 17 years old when he committed murder. He is 47 today. In 1988, Magill was resentenced to life in prison. Counsel remains in touch with Paul Magill and Mary Lou Magill, Paul's mother. Counsel recently received a letter from Paul:

January 31, 2004

Dear Mike

Greetings from Sunny Florida. It's a sunny 50 something outside now. The temp has been up and down for the past couple months. The weatherman can't seem to make up his mind.

As you can see by my return address, I'm no longer at Union. I got transferred out of the triangle (Starke, Raiford, Lake Butler) this past October, after 27 years in that area. After 10 days in transit at Lake Butler and Orlando CFRC, I arrived here on October 13. Got to see a lot of new buildings and road construction on the way here. And this place is so much bigger than FSP or UCI. It's still strange living in an open bay dorm and being able to stay outside and see the moon and stars until 9:30 pm.

Two and a half weeks after getting here, I started work in the Pride Work furniture factory here. So I've now worked for PRIDE 8 years and 4 months. I'm focusing solely on inventory control now, so I have less responsibilities than I had at Union Pride Metal. That goes along with my cut in pay and hours worked. Where I was getting a hundred hours every 2 weeks at 55¢ at Union, I'm now getting 64 hours at 45¢, a drastic reduction in income. I've also lost over 30 lbs. which has helped a great deal.

There are more programs here. I'm currently involved in the Lifer's Club, which offers a number of instructional and self improvement programs.

I've started putting together a Parole Plan, in anticipation of my second Parole Hearing next year in May. I've been attempting to contact people who could be prospective employers, transition programs. So far I haven't heard anything back. After over 27 years there are very few people I am familiar with in Marion County. I've been fishing for addresses and introducing myself to total strangers. I'm having to develop some very different communication skills from those I've relied on during my time in prison. It's like I'm a salesman, knocking on doors and making my sales pitch to people who don't know me and have no reason to trust me. I try to tell them as much as I can about me, without taking too much time and boring them. You don't happen to know anybody in the Ocala/Belleview area whom I could contact, do you?

I hope all is well with you and Deanna.

Sincerely yours,

Paul Magill
059128

Respectfully submitted,

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July 16, 2004

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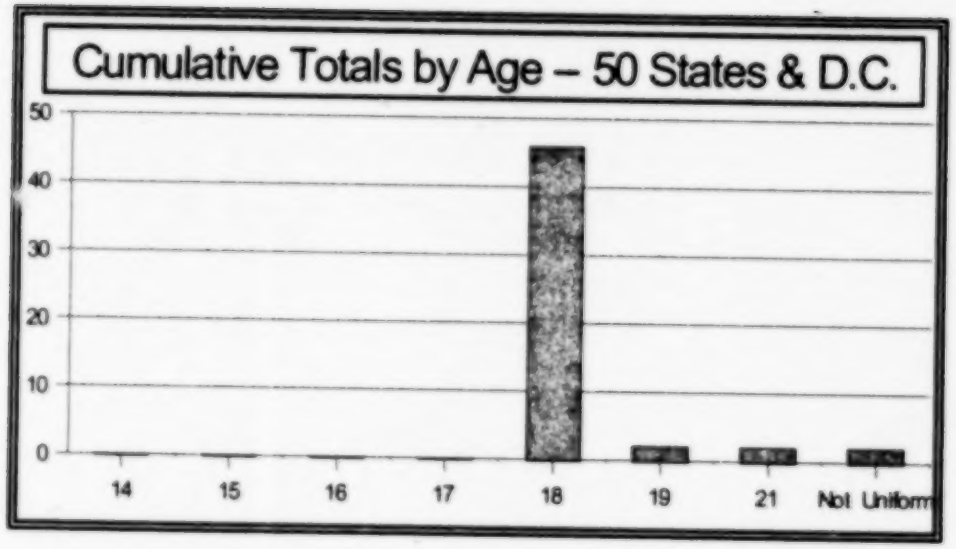
This brief is dedicated to Ida S. Mello. *See generally* Yvonne Lamb, *A Local Life: Ida S. Mello: Virginia Woman's Warmth, Caring Knew No Boundry*, Wash. Post, March 21, 2004.

APPENDIX A

Age of Majority**



** One state (MO) has no uniform age of majority.

Totals (50 States and D.C.)

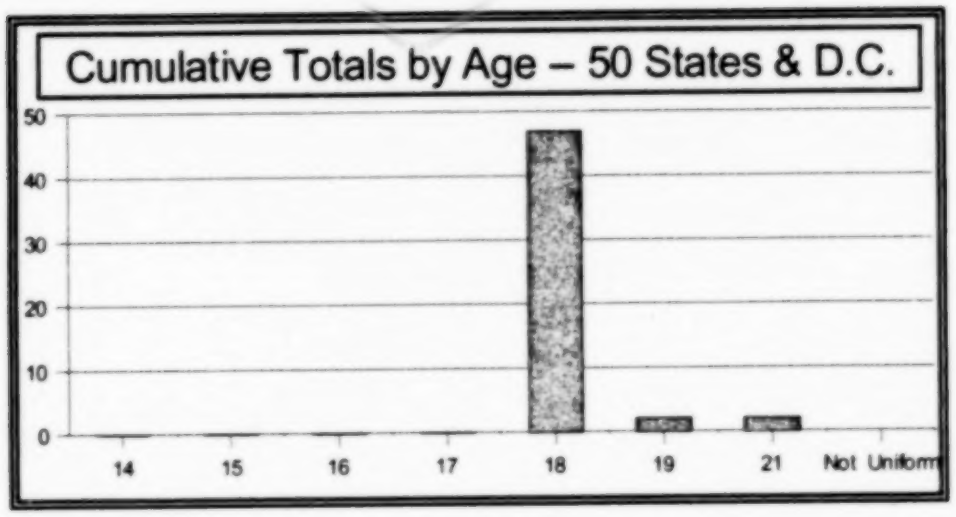
Age	18	19	21	Not Uniform
Number	46	2	2	1

STATE	AGE	CITATION
AL	19	Ala. Code §26-1-1 (2003)
AK	18	Alaska Stat. §25.20.010 (2003)
AZ	18	Ariz. Rev. Stat. Ann. §1-215 (2003)
AR	18	Ark. Stat. Ann. §9-25-101 (2003)
CA	18	Cal. Fam. Code §6500 (2004)
CO	18	Colo. Rev. Stat. §13-22-101 (2004)
CT	18	Conn. Gen. Stat. §1-1d (2003)
DE	18	Del. Code Ann. tit. 1, §701 (2003)
DC	18	DC St. §46-101 (2003)
FL	18	Fla. Stat. Ann. §743.07 (2003)
GA	18	OCGA §39-1-1 (2003)
HI	18	Haw. Rev. Stat. §577-1 (2003)
ID	18	Idaho Code §32-101 (2003)
IL	18	755 ILCS 5/11-1 (2003)
IN	18	In. St. 1-1-4-5, IC 1-1-4-5 (2003)
IA	18	Iowa Code Ann. §599.1 (2003)
KS	18	Ks. St. §38-101 (2002)
KY	18	Ky. St. §2.015 (2003)
LA	18	LSA-C.C. art. 29 (2003)
ME	18	Me. Rev. Stat. Ann. tit. 1, §72 (2003)
MD	18	Md. Code, art. 1, §24 (2004)
MA	18	M.G.L.A. 4 §7, cl. (51) (2004)
MI	18	Mich. Comp. Laws Ann. §722.52 (2003)
MN	18	Mn. St. §645.451 (2004)
MS	21	Miss. Code. Ann. §1-3-27 (2003)
MO	-	No Uniform Age
MT	18	Mt. St. 41-1-101 (2003)
NE	19	Neb. St. §43-2101 (2003)
NV	18	Nev. Rev. Stat. §129.010 (2003)
NH	18	N.H. Rev. Stat. Ann. 21:44 (2003)

NJ	18	N.J.S.A. 9:17B-3 (2003)
NM	18	N.M. St. §28-6-1 (2003)
NY	18	McKinney's D.R.L. §2, McKinney's CPLR §105(j) (2004)
NC	18	N.C.G.S.A. §48A-2 (2003)
ND	18	N.D. St. 14-10-01 (2003)
OH	18	Ohio Rev. Code Ann. §3109.01 (Baldwin 2003)
OK	18	15 Okl. St. Ann. §13 (2003)
OR	18	O.R.S. §109.510 (2001)
PA	21	1 Pa. C.S.A. §1991 (2003)
RI	18	R.I. §15-12-1 (2002)
SC	18	S.C. Const. art. XVII, §14 (2003)
SD	18	S.D. Codified Laws Ann. §26-1-1 (2003)
TN	18	Tenn. Code Ann. §1-3-105 (2003)
TX	18	V.T.C.A., Civil Practice & Remedies Code §129.001 (2003)
UT	18	Utah Code Ann. §15-2-1 (2003)
VT	18	Vt. Stat. Ann. tit. 1, §173 (2003-2004)
VA	18	Va. Code Ann. §1-13.42 (2003)
WA	18	Wa. St. 26.28.010 (2004)
WV	18	W. Va. Code §2-2-10 (aa) (2003)
WI	18	W.S.A. §938.02(1) (2003) (defining "adult" for all purposes except criminal investigation or prosecution
WY	18	Wyo. Stat §14-1-101 (2003)

APPENDIX B

Right to Serve on Jury



Totals (50 States and D.C.)

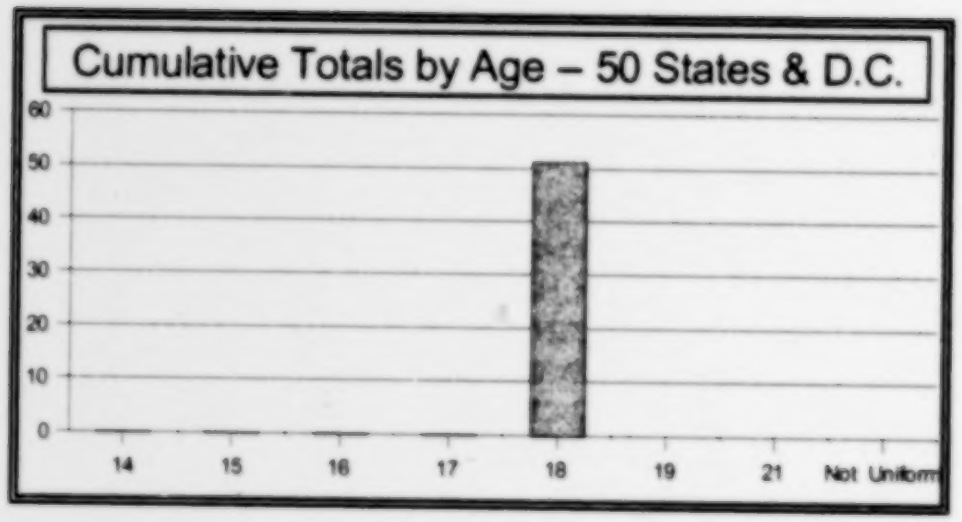
Age	18	19	21
Number	47	2	2

STATE	AGE	CITATION
AL	19	Ala. Code §12-16-60(a)(1) (2003)
AK	18	Ak. Stat. §09.20.010(a)(3) (2003)
AZ	18	Ariz. Rev. Stat. Ann. §21-301(D) (2003)
AR	18	Ark. Stat. §16-31-101(2003) (by inference)
CA	18	West's Ann. Cal. C.C.P. §203 (2004)
CO	18	C.R.S.A. §13-71-109(2)(a) (2004)
CT	18	Conn. Gen. Stat. §51-217 (2003)
DE	18	De. St. tit. 10, §4509(b)(2) (2003)
DC	18	D.C. Code Ann. §11-1906(b)(1)(C) (2003)
FL	18	Fla. Stat. Ann. §40.01 (2003)
GA	18	Ga. Code Ann., §15-12-163(b)(2) (2003); Ga. Code Ann., §15-12-60(a) (2003)
HI	18	Haw. Rev. Stat. §612-4(a)(1) (2003)
ID	18	Idaho Code §2-209(2)(a) (2003)
IL	18	705 ILCS 305/2 (2003)
IN	18	IC 33-4-5-7(B)(1) (2003)
IA	18	I.C.A. §607(A).4 (2003)
KS	18	Kan. Stat. Ann. §43-156 (2002)
KY	18	Ky. Rev. Stat. Ann. §29A.080(2)(a) (2003)
LA	18	La. Code Crim. Proc. Ann. art. 401(a)(2) (2003)
ME	18	Me. Rev. Stat. Ann. tit. 14, §1211 (2003)
MD	18	Md. Cts. & Jud. Proc. Code Ann. §8-104 (2004)
MA	18	Mass. Gen. Laws. Ann. ch. 234, §1 (2003), ch. 51, §1 (2003)
MI	18	Mich. Comp. Laws Ann. §600.1307a(1)(a) (2003)
MN	18	Minn. Gen. R. Prac., Rule 808(b) (2003)
MS	21	Miss. Code Ann. §13-5-1 (2003)

MO	21	V.A.M.S. §494.400 (2003), V.A.M.S. §494 425 (2003)
MT	18	Mont. Code Ann. §3-15-301 (2003), Mt. Const. art. 4, §2 (2003)
NE	19	Neb. Rev. Stat. §25-1601 (2003)
NV	18	Nev. Rev. Stat. §6.010 (2003), 55 ILCS 5/1-5013 (2003)
NH	18	N.H. Rev. Stat. §500-A:7-a (2003)
NJ	18	N.J.S.A. 2B:20-1 (2003)
NM	18	N.M. St. §38-5-1 (2003)
NY	18	N.Y. Judiciary Law §510(2) (2003)
NC	18	N.C. Gen. Stat. §9-3 (2003)
ND	18	N.D. Cent. Code §27-09.1-08(2)(b) (2003)
OH	18	Ohio Rev. Code Ann. §2313.42 (2003)
OK	18	Okla. Stat. Ann. tit. 38, §28 (2003)
OR	18	Or. Rev. Stat. §10.030(2)(c), (3)(a)(c) (2003)
PA	18	Pa. Stat. Ann. tit. 42, §4521 (2003)
RI	18	R.I. Gen. Laws §9-9-1(a)(2) (2003)
SC	18	S.C. Code Ann. §14-7-130 (2003)
SD	18	S.D. Codified Laws Ann. §16-13-10 (2003)
TN	18	Tenn. Code Ann. §22-1-101 (2003)
TX	18	Tex. Gov't Code Ann. §62.102 (2003)
UT	18	Utah Code Ann. §78-46-7(1)(b) (2003)
VT	18	Vt. St. tit. 4, §962 (2003-2004)
VA	18	Va. Code Ann. §8.01-337 (2003)
WA	18	Wash. Rev. Code Ann. §2.36.070 (2004)
WV	18	W. Va. Code §52-1-8(b)(1) (2003)
WI	18	W.S.A. §756.02 (2003)
WY	18	Wyo. Stat. §1-11-101 (2003)

APPENDIX C

Right to Vote



Totals (50 States and D.C.)

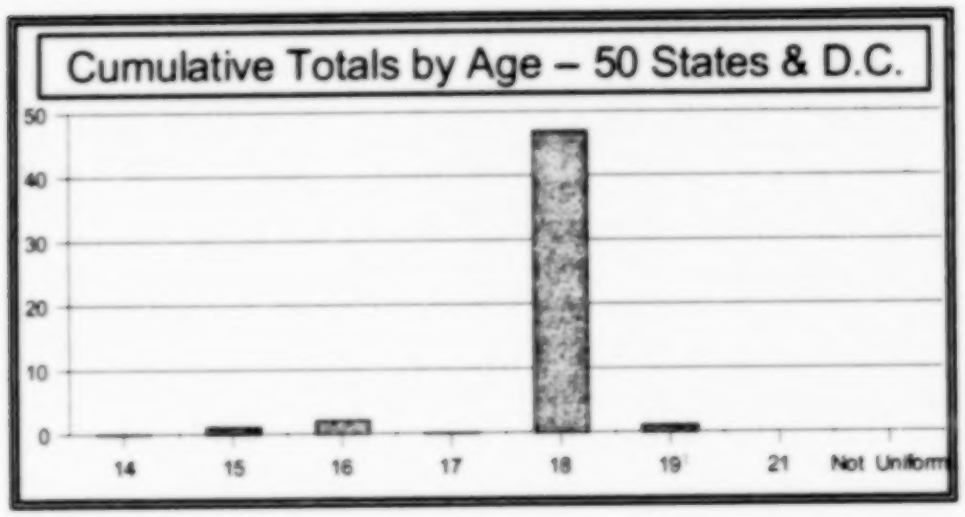
Age	18
Number	51

STATE	AGE	CITATION
AL	18	Al. Const. Amend. No. 579 (2003)
AK	18	Ak. Const. art. 5, §1 (2003); Ak. St. §15.05.010 (2003)
AZ	18	Az. St. §16-121 (2003); Az. Const. art. 7, §2 (2004)
AR	18	Ar. Const. art. 3, §1 (2003)
CA	18	Cal. Const. art. 2, §2 (2004)
CO	18	Colo. Rev. Stat. §1-2-101 (2004)
CT	18	Ct. Const. art. 6, §1 (2003); Conn. Gen. Stat. §9-12 (2003)
DE	18	De. St. tit. 15, §1701 (2003)
DC	18	D.C. St. §1-1001.02(2)(b) (2003)
FL	18	Fla. Stat. Ann. §97.041 (2003)
GA	18	Ga. Const. art. 2, §1, para 2(2003)
HI	18	Haw. Rev. Stat. tit. 2, §11-12 (2003)
ID	18	Idaho Code §34-402 (2003)
IL	18	Il. St. ch. 10 §5/7-43 (2003)
IN	18	In. St. 3-7-13-1 (2003)
IA	18	I.C.A. §48A.5 (2003)
KS	18	Kan. Const. art. 5, §1 (2003)
KY	18	Ky. Const. §145 (2003)
LA	18	La. Const. art. 1, §10(A) (2004); La. Rev. Stat. Ann. §18:101 (2003)
ME	18	Me. Rev. Stat. Ann. tit. 21-A, §111(2) (2003)
MD	18	Md. Code, Election Law, §3-102(a) (2004)
MA	18	Mass. Gen. Laws Ann. ch. 51, §1 (2004)
MI	18	Mich. Comp. Laws Ann. §168.492 (2003)
MN	18	Minn. Stat. Ann. §201.014 (2003)
MS	18	Miss. Const. art. 12, §241 (2003)
MO	18	Mo. Const. art. VIII, §2 (2003)

MT	18	Mont. Const. art. IV, §2 (2003); Mt St 13-1-111 (2003)
NE	18	Neb. Rev. St. Const. art. VI, §1 (2003); Neb. Rev. Stat. §32-223 (2003)
NV	18	Nev. Rev. Stat. §293.485 (2003)
NH	18	N.H. Const., Pt. 1, Art. 11 (2003)
NJ	18	N.J. Const. art 2, §1, para. 3 (2003)
NM	18	N.M. St. §1-21-2 (2003)
NY	18	N.Y Elec. Law §5-102 (2003)
NC	18	N.C. Gen. Stat. §163-55 (2003)
ND	18	N.D. Const. art. II, §1 (2003)
OH	18	Ohio Const. art. V, §1 (2003); Ohio Rev. Code Ann. §§3503.01 & 3503.11 (2003)
OK	18	Okla. Const. art. III, §1 (2003)
OR	18	Or. Const. art. II, §2 (2003)
PA	18	Pa. Stat. Ann. tit. 25, §2811 (2003)
RI	18	R.I. Gen. Laws §17-1-3 (2003)
SC	18	S.C. Code Ann. §7-5-610 (2003)
SD	18	S.D. Const. art. VII, §2 (2001); S.D. Codified Laws Ann. §12-3-1 (2001)
TN	18	Tenn. Code Ann. §2-2-102 (2003)
TX	18	V.T.C.A., Election Code §11.002 (2003)
UT	18	Ut. St. §20A-2-101 (2003)
VT	18	Vt. Stat. Ann. tit. 17, §2121 (2003-2004)
VA	18	Va. Const. art. II, §1 (2003)
WA	18	Wash. Const. art. VI, §1, (2003)
WV	18	W. Va. Code §3-1-3 (2003)
WI	18	Wis. Const. art. 3, §1 (2004) W.S.A. 6.02 (2003); W.S.A. 6.05 (2003)
WY	18	Wy. St. §22-3-102 (2003)

APPENDIX D

Right to Marry Without Parental Consent



Totals (50 States and D.C.)

Age	15	16	18	19
Number	1	2	47	1

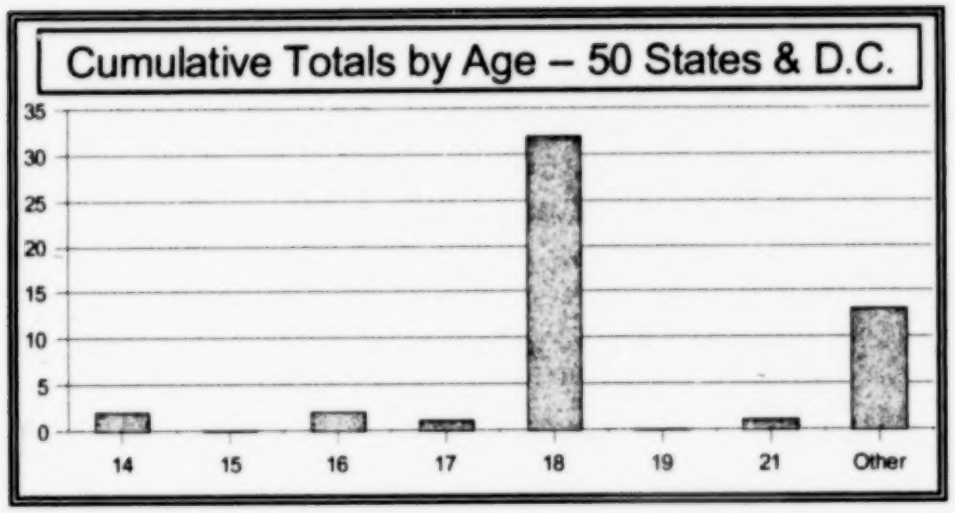
STATE	AGE	CITATION
AL	18	Ala. Code §30-1-5 (2003)
AK	18	Alaska Stat. §25.05.171 (2003) (judge may permit minor to marry without parental consent, even in the face of parental opposition, in certain circumstances)
AZ	18	Az. St. §25-102 (2003)
AR	18	Ark. Stat. Ann. §9-11-102 through 9-11-105 (2003)
CA	18	West's Ann. Cal. Fam. Code §301 (2004); Ca. Fam. §302 (2004)
CO	18	Colo. Rev. Stat. §14-2-106(1)(a)(I) (2004)
CT	18	Conn. Gen. Stat. §46b-30 (2003)
DE	18	Del. Code Ann. tit. 13, §123 (2003)
DC	18	D.C. Code §46-411 (2003)
FL	18	Fla. Stat. Ann. §741.04 (2003); West's F.S.A. §741.0405 (2003)
GA	16	OSCGA §19-3-37 (1982)
HI	18	Haw. Rev. Stat. §572-2 (2003)
ID	18	Idaho Code §32-202 (2003)
IL	18	750 I.L.C.S. 5/203 (2003)
IN	18	I.C. 31-11-1-4 (2003); I.C. 31-11-1-6 (2003)
IA	18	Iowa Code Ann. §595.2 (2003)
KS	18	Kan. Stat. Ann. §23-106 (2002)
KY	18	Ky. Rev. Stat. Ann. §402.210 (2003)
LA	18	La. Civ. Code Ann. art. 87 (Supp. 1988) (minors not legally prohibited from marrying, even without parental consent, but marriage ceremony required); La. Rev. Stat. Ann. §9:21 (Supp. 1988) (official

		may not perform marriage ceremony in which a minor is a party without parental consent; Comments to Civ. Code Ann. art. 87 suggest that such a marriage is valid but that official may face sanctions)
ME	18	Me. St. tit. 19, §652 (2003)
MD	16	Md. Fam. Law Code Ann. §2-301 (Supp. 1987)
MA	18	Mass. Gen. Laws. Ann. Ch. 207 §7 (2004)
MI	18	Mich. Comp. Laws Ann. §551.103 (2003)
MN	18	Minn. Stat. Ann. §517.02 (2004)
MS	15	Miss. Code Ann. §93-1-5(d) (Supp. 1987) (female may marry at 15 without parental consent)
MO	18	Mo. Ann. Stat. §451.090 (2003)
MT	18	Mont. Code Ann. §40-1-202 (2003)
NE	19	Neb. Rev. Stat. §42-105 (2003); Neb. St. §43-2101 (2003)
NV	18	Nev. Rev. Stat. §122.020 (2003)
NH	18	N.H. Rev. Stat. Ann. §457:5 (2003)
NJ	18	N.J.S.A. 37:1-6 (2003)
NM	18	N.M. Stat. Ann. §40-1-6 (2003)
NY	18	McKinney's D.R.L. §15 (2004); N.Y. Dom. Rel. §15 (2003)
NC	18	N.C. Gen. Stat. §51-2 (2003)
ND	18	N.D. Cent. Code §14-03-02 (2003)
OH	18	Ohio Rev. Code Ann. §3101.01 (2003)
OK	18	Okla. Stat. Ann. tit. 43, §3 (2003)
OR	18	Or. Rev. Stat. §106.060 (2001)
PA	18	23 Pa. C.S.A. §1304 (2003)
RI	18	R.I. Gen. Laws §15-2-11 (2003)
SC	18	S.C. St. §20-1-250 (2003); SC ST §20-1-100 (2003)
SD	18	S.D. Codified Laws Ann. §25-1-9 (2003)
TN	18	Tenn. Code Ann. §36-3-106 (2003)

TX	18	V.T.C.A., Family Code §2.101 (2003); V.T.C.A., Family Code §2.102 (2003)
UT	18	Utah Code Ann. §30-1-9 (2003)
VT	18	Vt. Stat. Ann. tit. 18, §5142 (2003-2004)
VA	18	Va. Code Ann. §20-48 (2003)
WA	18	Wash. Rev. Code Ann. §26.04.210 (2004)
WV	18	W. Va. Code §48-2-301 (2003)
WI	18	Wis. Stat. Ann. §765.02 (2003)
WY	18	Wyo. Stat. §20-1-102(c) (2003)

APPENDIX E

Consent to Most Forms of Medical Treatment



Totals (50 States and D.C.)

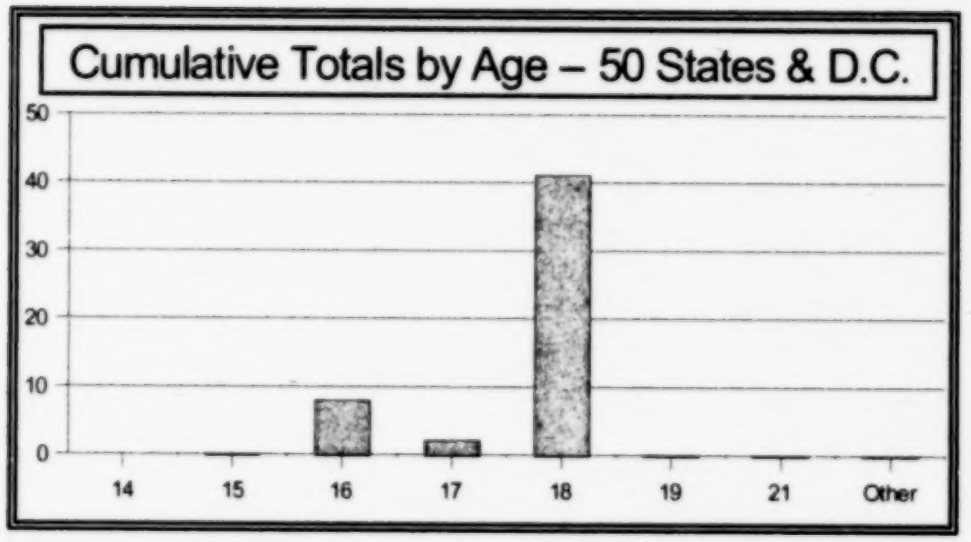
Age	14	15	16	17	18	21	Other
Number	2	0	2	1	32	1	13

STATE	AGE	CITATION
AL	14	Ala. Code §22-8-4 (2003)
AK	18	Alaska Stat. §25.20.025 (2003)
AZ	18	Ariz. Rev. Stat. Ann. §44-132 (2004)
AR	Minor of Sufficient Intelligence	Ark. Code Ann. §20-9-602 (2003)
CA	Any Minor	Cal. Fam. Code §6920 (2004)
CO	18	Colo. Rev. Stat. §13-22-103 (2003)
CT	18	Conn. Gen. Stat. Ann. §46b-150d (2003)
DE	18	Del. Code. Ann. tit. 13, §707 (2004)
DC	-	No Legislation
FL	Any Minor	Fla. Stat. Ann. §743.064 (2003)
GA	18	Ga. Code Ann. §31-8-2 (2002)
HI	17	Haw. Rev. Stat. §577A-2 (2003)
ID	14	Idaho Code §39-801 (2003)
IL	18	410 Ill. Comp. Stat. 210/1 (2004)
IN	18	Ind. Code Ann. §16-36-1-3 (Michie 2004)
IA	18	Iowa Code §147.137 (2003)
KS	18	Kan. Stat. Ann. §38-122 (2003)
KY	18	Ky. Rev. Stat. Ann. §216B.400 (Michie 2002)
LA	18	La. Rev. Stat. Ann. §40:1095 (2004)
ME	18	Me. Rev. Stat. tit. 32, §3292 (2003)
MD	Any Minor	Md. Code Ann., Health-Gen. §20-102 (2003)
MA	18	Mass. Ann. Laws ch. 112, §12F (Law. Co-op. 2004)

MI	-	No Legislation
MN	18	Minn. Stat. Ann. §144.341 (2003)
MS	21	Miss. Code Ann. §41-41-3 (2004)
MO	18	Mo. Ann. Stat. §431.061 (2004)
MT	18	Mont. Code Ann. §41-1-402 (2003)
NE	-	No Legislation
NV	18	Nev. Rev. Stat. Ann. 129.030 (2004)
NH	-	No Legislation
NJ	18	N.J. Stat. Ann. §9:17B-1(A) (2004)
NM	18	N.M. Stat. Ann. §24-10-1 (2003)
NY	18	N.Y. Pub. Health Law§ 2504 (2003)
NC	18	N.C. Gen. Stat. §90-21.1 (2004)
ND	18	N.D. Cent. Code §14-10-17.1 (2003)
OH	18	Ohio Rev. Code Ann. §2317.54 (Anderson 2003)
OK	18	Okla. Stat. Ann. tit. 63, §2602 (2003)
OR	18	Or. Rev. Stat. §109.640 (2001)
PA	18	Pa. Stat. Ann. tit. 35, §10101(2003)
RI	16	R.I. Gen. Laws §23.4.6-1 (2003)
SC	16	S.C. Code. Ann. §20-7-280 (Law. Co-op. 2003)
SD	18	S.D. Codified Laws §20-9-4.2 (2003)
TN	Any Minor	Tenn. Code. Ann. §63-6-229 (2003)
TX	18	Tex. Fam. Code Ann. §32.003 (2004)
UT	-	No Legislation
VT	-	No Legislation
VA	18	Va. Code Ann. §16.1-334 (2003)
WA	18	Wash. Rev. Code Ann. §26.28.015(5) (2004)
WV	-	No Legislation
WI	-	No Legislation
WY	18	Wyo. Stat. Ann. §35-2-614 (2003)

APPENDIX F

Right to Drive Without Parental Consent



Totals (50 States and D.C.)

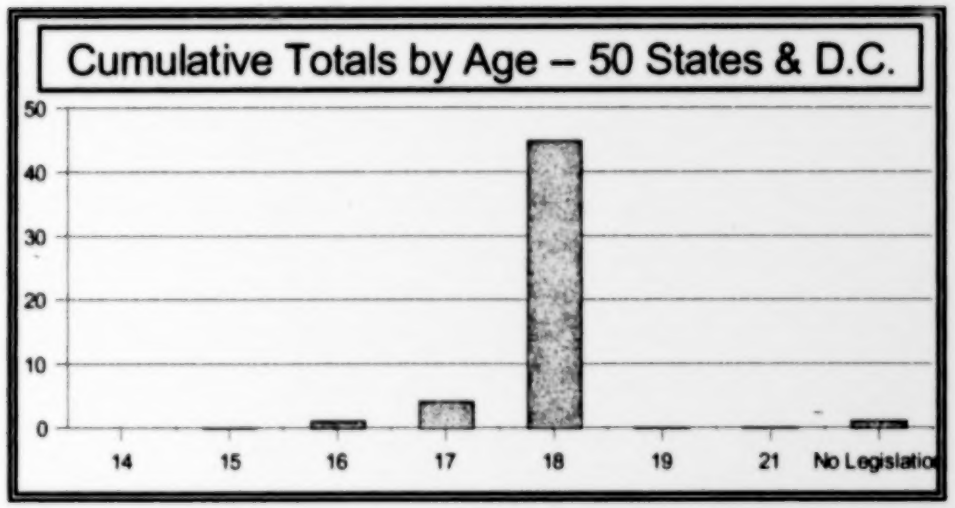
Age	16	17	18
Number	8	2	41

STATE	AGE	CITATION
AL	16	Ala. Code §32-6-7(1) (2003)
AK	18	Alaska Stat. §28.15.071 (2003)
AZ	18	Ariz. Rev. Stat. Ann. §28-3160 (2004)
AR	18	Ark. Code Ann. §27-16-702 (2003)
CA	18	Cal. Veh. Code §12512 (2004)
CO	18	Colo. Rev. Stat. §42-2-108 (2003)
CT	18	Conn. Gen. Stat. Ann. §14-36 (2003)
DE	18	Del. Code Ann. tit. 11, §2707(a) (2004)
DC	16	D.C. Code Ann. §50-1401.01 (2003)
FL	18	Fla. Stat. Ann. §322.09 (2003)
GA	18	Ga. Code Ann. §40-5-26 (2002)
HI	18	Haw. Rev. Stat. §286-112 (2003)
ID	18	Idaho Code §49-310 (2003)
IL	18	625 Ill. Comp. Stat. 5/6-103 (2004)
IN	18	Ind. Code Ann. §9-24-9-3 (Michie 2004)
IA	18	Iowa Code §321.177 (2003)
KS	16	Kan. Stat. Ann. §8-237 (2003)
KY	18	Ky. Rev. Stat. Ann §186.470 (Michie 2002)
LA	18	La. Rev. Stat. Ann. §32:407 (2004)
ME	18	Me. Rev. Stat. tit. 29, §1302 (2003)
MD	18	Md. Code Ann., Transp. §16-103 (2003)
MA	18	Mass. Ann. Laws ch. 90, §8 (Law. Co-op. 2004)
MI	18	Mich. Comp. Laws §257.308 (2003)
MN	18	Minn. Stat. Ann. §171.04 (2003)
MS	17	Miss. Code Ann. §61-1-23 (2004)
MO	16	Mo. Ann. Stat. §302.060 (2004)
MT	16	Mont. Code Ann. §61-5-105 (2003)
NE	17	Neb. Rev. Stat. Ann. §60-4,118.05 (2003)
NV	18	Nev. Rev. Stat. Ann. 483.250 (2004)

NH	18	N.H. Rev. Stat. Ann. §263:17 (2003)
NJ	18	N.J. Stat. Ann. §39:3-10 (2004)
NM	18	N.M. Stat. Ann. §66-5-11 (2004)
NY	18	N.Y. Veh. & Traf. Law §502(2)(b) (2003)
NC	18	N.C. Gen. Stat. §20-10 (2004)
ND	18	N.D. Cent. Code §39-06-08 (2003)
OH	18	Ohio Rev. Code Ann. §4507.07 (Anderson 2003)
OK	16	Okla. Stat. Ann. tit. 47, §6-107 (2003)
OR	18	Or. Rev. Stat. §807.060(2)(a) (2001)
PA	17	Pa. Stat. Ann. tit. 75, §1503(a)(7) (2003)
RI	16	R.I. Gen. Laws §31-10-3 (2003)
SC	18	S.C. Code. Ann. §56-1-100 (Law. Co-op. 2003)
SD	18	S.D. Codified Laws §32-12-6 (2003)
TN	18	Tenn. Code. Ann. §55-50-312 (2003)
TX	16	Tex. Transp. Code Ann. §521.204 (2004)
UT	18	Utah Code Ann. §53-3-211 (2003)
VT	18	Vt. Stat. Ann. tit. 23, §607 (2003)
VA	18	Va. Code Ann. §46.2-334(2003)
WA	18	Wash. Rev. Code Ann. §46.20.100 (2004)
WV	18	W. Va. Code §§ 17B-2-3 to 17B-2-3(a) (2003)
WI	18	Wis. Stat. Ann. §343.08 (2003)
WY	18	Wyo. Stat. Ann. §31-7-112 (2003)

APPENDIX G

Right to Purchase Pornographic Materials



Totals (50 States and D.C.)

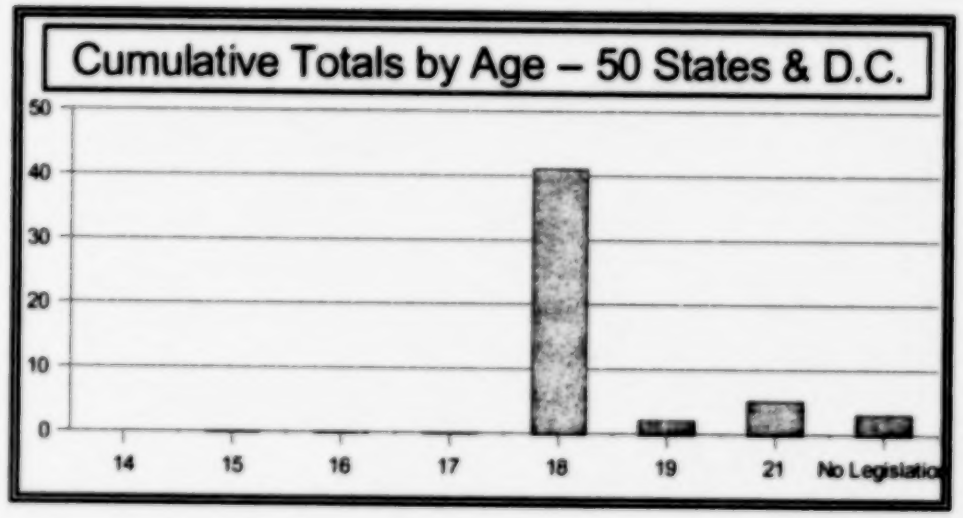
Age	16	17	18	No Legislation
Number	1	4	45	1

STATE	AGE	CITATION
AL	18	Ala. Code §13A-12-200.5 (2003)
AK	-	No Legislation
AZ	18	Ariz. Rev. Stat. §13-3506 (2004)
AR	18	Ark. Code Ann. §5-68-502(2) (2003)
CA	18	Cal. Penal Code §313.1 (2004)
CO	18	Colo. Rev. Stat. §18-7-502 (2003)
CT	18	Conn. Gen. Stat. §53a-196 (2003)
DE	17	Del. Code Ann. tit. 11, §1365 (2004)
DC	17	D.C. Code Ann. §22-2001(b) (2003)
FL	18	Fla. Stat. Ann. §847.012 (2003)
GA	18	Ga. Code Ann. §16-12-103 (2002)
HI	16	Haw. Rev. Stat. §712-1215 (2003)
ID	18	Idaho Code §18-1513 (2003)
IL	18	720 Ill. Comp. Stat. 5/11-21 (2004)
IN	18	Ind. Code Ann. §35-49-3-3 (Michie 2004)
IA	18	Iowa Code §728.2 (2003)
KS	18	Kan. Stat. Ann. §21-4301a (2003)
KY	18	Ky. Rev. Stat. Ann. §531.030 (Michie 2002)
LA	17	La. Rev. Stat. Ann. §14:91.11 (2004)
ME	18	Me. Rev. Stat. tit. 17, §2911 (2003)
MD	18	Md. Code Ann., Criminal Law §11-203 (2003)
MA	18	Mass. Ann. Laws ch. 272, §28 (Law. Co-op. 2004)
MI	18	Mich. Comp. Laws Ann. §750.142 (West 2004)
MN	18	Minn. Stat. Ann. §617.293 (West 2004)

MS	18	Miss. Code Ann. §97-5-27 (2003)
		MO 18 Mo. Ann. Stat. §753.040 (West 2003)
MT	18	Mont. Code Ann. §45-8-206 (2003)
NE	18	Neb. Rev. Stat. §28-208 (2003)
NV	18	Nev. Rev. Stat. Ann. 201.265 (2003)
NH	18	N.H. Rev. Stat. Ann. §571-B:2 (2003)
NJ	18	N.J. Stat. Ann. §2C:34-2(b) (2003)
NM	18	N.M. Stat. Ann. §30-37-2 (2003)
NY	17	N.Y. Penal Law §§ 235.21 to 235.22 (2004)
NC	18	N.C. Gen. Stat. §19-13 (2003)
ND	18	N.D. Cent. Code §12.1-27.1-03 (2003)
OH	18	Ohio Rev. Code Ann. §2907.31 (West 2003)
OK	18	Okla. Stat. Ann. tit. 21, §1040.76 (West 2003)
OR	18	Or. Rev. Stat. §167.065 (2001)
PA	18	18 Pa. Cons. Stat. Ann. §5903(a)(2) (West 2003)
RI	18	R.I. Gen. Laws §11-31-10 (2003)
SC	18	S.C. Code. Ann. §16-15-345 (Law. Co-op. 2003)
SD	18	S.D. Codified Laws §22-24-28(2003)
TN	18	Tenn. Code. Ann. §§ 39-17-911 and 39-17-914 (2003)
TX	18	Tex. Penal Code Ann. §43.24(b) (2003)
UT	18	Utah Code Ann. §76-10-1206 (2003)
VT	18	Vt. Stat. Ann. tit. 13, §§ 2802 to 2802(a) (2004)
VA	18	Va. Code Ann. §18.2-391(2003)
WA	18	Wash. Rev. Code Ann. §9.68.080 (2004)
WV	18	W. Va. Code §61-8A-2 (2003)
WI	18	Wis. Stat. Ann. §944.21(4) (2003)
WY	18	Wyo. Stat. Ann. §6-4-302(b)(ii) (2003)

APPENDIX H

Right to Participate in Legalized Gambling in any Form



Totals (50 States and D.C.)

Age	18	19	21	No Legislation or No Legalized Gambling
Number	42	1	5	3

STATE	TYPE	AGE	CITATION
AL	Pari-mutuel Betting	19	Ala. Code §11-65-44 (2003)
AK		-	No Legislation
AR	Pari-mutuel Betting	18	Arkansas Stat. §23-110-405 (2003)
AZ	Lottery	21	Ariz. Rev. Stat. Ann. §5-515 (2003)
	Pari-mutuel Betting	21	Ariz. Rev. Stat. Ann. §5-112 (2003)
CA	Lottery	18	Cal. Govt. Code §8880-52 (2004)
CO	Lottery	18	Colo. Rev. Stat. Ann. §24-35-214 (2004)
	Pari-mutuel	18	Colo. Rev. Stat. Ann. §12-60-601 (2004)
	Casinos	21	Colo. Rev. Stat. Ann. §12-47.1-809 (2004)
CT	Lottery	18	Conn. Gen. Stat. Ann §12-813 (2003)
	Pari-mutuel	18	Conn. Gen. Stat. Ann. §12-576 (2003)
DE	Lottery	18	Dela. Const. art. 2, §17 (2003)
DC	Lottery	18	D.C. Code §3-1334 (2003)
FL	Small Stakes	18	Fla. Stat. Ann. §849.085 (2003)
	Lottery	18	Fla. Stat. Ann. §24.1055 (2003)
GA	Lottery	18	Ga. Code Ann. §50-2710 (2003)

HI	Social Gambling	18	Haw. Rev. Stat. 712-1231 (2003)
ID	Lottery	18	Ida. Stat. §67-7413 (2003)
IL	Lottery	18	20 Ill. Comp. Stat. Ann. §1605/15 (2003)
	Casinos	21	230 Ill. Comp. Stat. Ann. §10/18 (2003)
IN	Lottery	18	Ind. Code Ann. §4-30-11-3 (2003)
IA	Lottery	21	Iowa Code Ann. §99E.18(2) (2003)
	Pari-mutuel	21	Iowa Code Ann. §99D.11(7) (2003)
	Casinos	21	Iowa Code §99F.9(5) (2003)
KS	Lottery	18	Kan. Stat. Ann. §74-8708 (2002)
	Pari-mutuel	18	Kan. Stat. Ann. §74-8839 (2002)
KY	Lottery	18	Ky. Rev. Stat. Ann. §154A.990 (2003)
LA	Lottery	21	La. Rev. Stat. §47:9025 (2003)
	Casinos	21	La. Rev. Stat. §27:260 (2003)
ME	Lottery	18	Me. Rev. Stat. Ann. tit. 8, §374 (2003)
	Pari-mutuel	18	Me. Rev. Stat. Ann. tit 8, §275-D (2003)
MD	Lottery	18	Md. State Govt. §9-124 (2004)
MA	Lottery	18	Mass. Gen. Laws Ann. ch. 10, §24 (2004)
	Pari-mutuel	18	Mass. Gen. Laws Ann. ch. 128A, §10 (2004)

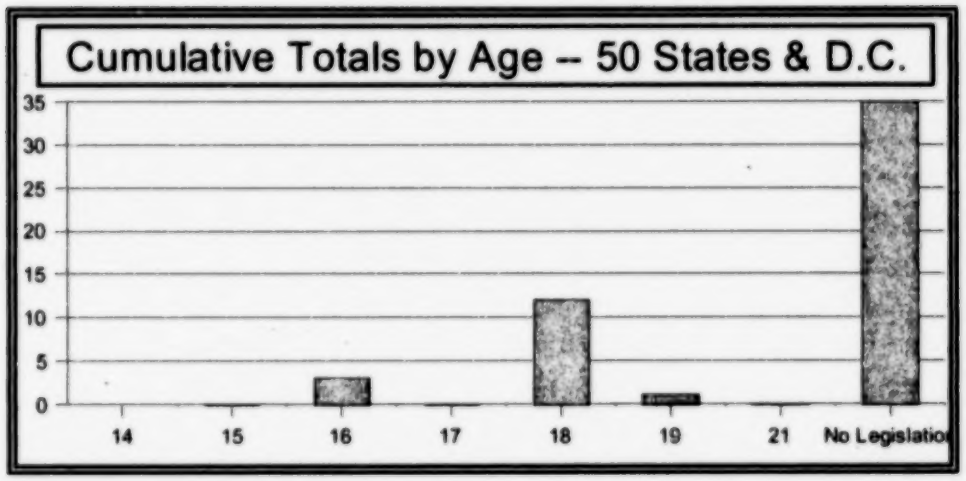
MI	Lottery	18	Mich. Comp. Laws Ann. §432.29 (2003)
MN	Lottery	18	Minn. Stat. Ann. §349A.12 (2003)
MS	Casinos	21	Miss. Code Ann. §75-76-155 (2003)
MO	Lottery	18	Mo. Ann. Stat. §313.280 (2003)
	Pari-mutuel	18	Mo. Ann. Stat. §313.670 (2003)
	Casinos	21	Mo. Ann. Stat. §313.817 (2003)
MT	Generally	18	Mont. Code Ann. §23-5-158 (2003)
NE	Lottery	18	Neb. Rev. Stat. §9-430 (2003)
NV	Generally	21	Nev. Rev. Stat. §463.350 (2003)
NH	Lottery	18	N.H. Rev. Stat. §287-F:8 (2003)
	Pari-mutuel	18	N.H. Rev. Stat. §284-33 (2003)
NJ	Lottery	18	N.J. Stat. Ann. §5:9-15 (2003)
	Pari-mutuel	18	N.J. Stat. Ann. §5:5-65 (2003)
	Casinos	21	N.J. Stat. Ann. §5:12-119(2003)
NM	Lottery	18	N.M. Stat. Ann. §6-24-15 (2003)
	Casinos	21	N.M. Stat. Ann. §11-13-1 (2003)
NY	Lottery	18	N.Y. Tax Law §1610 (2003)
NC		-	No Legislation

ND	Lottery	18	N.D. Cent. Code §53-12-24 (2003)
OH	Lottery	18	Ohio Rev. Code Ann. §3770.08 (2003)
OK	Pari-mutuel	18	Okla. Stat. Ann. tit. 3A, §208.4 (2003)
OR	Lottery	18	Or. Rev. Stat. §461.600 (2001)
	Pari-mutuel	18	Or. Rev. Stat. §462.190 (2001)
PA	Lottery	18	Pa. Stat. Ann. tit. 72, §3761-309 (2003)
RI	Lottery	18	R.I. Gen. Laws Ann. §42-61-9 (2002)
	Pari-mutuel	18	R.I. Gen. Laws Ann. §41-4-2 (2002)
SC	Lottery	18	S.C. Code Laws Ann. §59-150-210 (2003)
SD	Lottery	18	S.D. Codified Laws §42-7A-32 (2003)
	Pari-mutuel	18	S.D. Codified Laws §42-7-76 (2003)
	Casinos	21	S.D. Codified Laws §42-7B-35 (2003)
TN	Pari-mutuel	18	Tenn. Code Ann. §4-36-310 (2003)
TX	Lottery	18	Tex. Govt. Code Ann. §466.3051 (2003)
UT	-	-	Gambling Illegal
VT	Lottery	18	Vt. Stat. Ann. tit. 31, §661 (2003)
	Pari-mutuel	18	Vt. Stat. Ann. tit. 31, §613 (2003)
VA	Lottery	18	Va. Ann. Code §58.1-4015 (2003)
	Pari-mutuel	18	Va. Ann. Code §59.1-403

WA	Lottery	18	Wash. Rev. Code Ann. §67.70.120 (2004)
WV	Lottery	18	W.Va. Code §29-22-11 (2003)
WI	Lottery	18	Wis. Stat. Ann. §565.17 (2003)
WY	Pari-mutuel	18	Wyo. Stat §11-25-109 (2003)

APPENDIX I

Right to Patronize Pool Halls



Totals (50 States and D.C.)

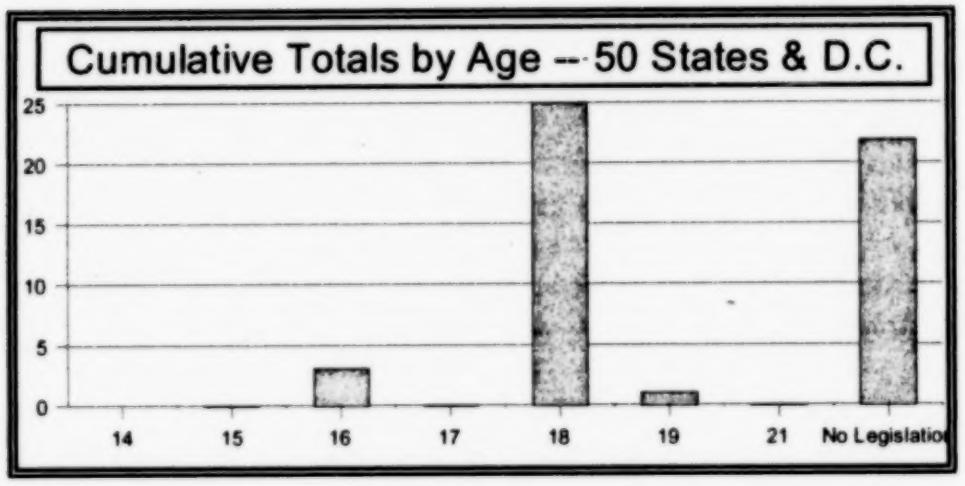
Ages	16	18	19	N/A
Numbers	3	12	1	35

STATE	AGE	CITATION
AL	19	Ala. Code §34-6-9 (2003)
AK	-	No Legislation
AZ	-	No Legislation
AR	18	Ark. Stat. Ann. §5-27-224(e) (2003)
CA	-	No Legislation
CO	-	No Legislation
CT	18	Conn. Gen. Stat. §53-281 (Repealed 1994)
DE	-	No Legislation
DC	-	No Legislation
FL	18	Fla. Stat. Ann. §849.04 (2003)
GA	-	No Legislation
HI	-	No Legislation
ID	-	No Legislation
IL	-	No Legislation
IN	-	No Legislation
IA	-	No Legislation
KS	-	No Legislation
KY	18	Ky. Rev. Stat. Ann. §436.320 (2003)
LA	18	La. Rev. Stat. Ann. §26.90 (2003)
ME	16	Me. Rev. Stat. Ann. tit. 26, §773 (2003)
MD	-	No Legislation
MA	18	Mass. Gen. Laws Ann. ch.140, §179 (2003)
MI	-	No Legislation
MN	-	No Legislation
MS	18	Miss. Code Ann. §97-5-11 (2003)
MO	16	Mo. Ann. Stat. §318.090 (2003)
MT	-	No Legislation
NE	-	No Legislation
NV	-	No Legislation
NH	-	No Legislation

NJ	-	No Legislation
NM	-	No Legislation
NY	16	N.Y. Gen. Bus. Law §465 (Repealed 1988)
NC	18	N.C. Gen. Stat. §14-317 (2003) (minors may not enter premises where alcohol sold)
ND	-	No Legislation
OH	-	No Legislation
OK	-	No Legislation
OR	-	No Legislation
PA	18	Pa. Stat. Ann. tit. 18, §7105 (2003)
RI	18	R.I. Gen. Laws §5-2-13 (2002)
SC	18	S.C. Code Ann. §20-7-350 (Repealed 1996)
SD	-	No Legislation
TN	-	No Legislation
TX	-	No Legislation
UT	-	No Legislation
VT	-	No Legislation
VA	-	No Legislation
WA	-	No Legislation
WV	-	No Legislation
WI	-	No Legislation
WY	18	Wyo. Stat. §33-6-108(b) (2003)

APPENDIX J

Right to Pawn Property or to Sell Junk or Precious Metals to Dealers



Totals (50 States and D.C.)

Ages	16	18	19	N/A
Numbers	3	25	1	22

STATE	AGE	CITATION
AL	19	Ala. Code §5-19A-8 (2003)
AK	-	No Legislation
AZ	16	Ariz. Rev. Stat. Ann. §44-1627 (Repealed 1988)
AR	-	No Legislation
CA	16	Cal. Fin. Code §21207 (2004)
CO	18	Colo. Rev. Stat. §12-56-104 (2003)
CT	18	Conn. Gen. Stat. §21-47 (2003)
DE	18	Del. Code Ann. tit. 24, §2312 (2003)
DC	-	No Legislation
FL	18	Fl. Stat. Ann. §743.07 (2003)
GA	-	No Legislation
HI	-	No Legislation
ID	-	No Legislation
IL	18	Ill. Comp. Stat. Ann. ch. 23, para. 2366 (2003)
IN	18	Ind. Code Ann. §28-7-5-36 (2003)
IA	-	No Legislation
KS	18	Kan. Stat. Ann. §16-717 (2002)
KY	18	Ky. Rev. Stat. Ann. §226.030 (2003)
LA	-	No Legislation
ME	-	No Legislation
MD	-	No Legislation
MA	-	No Legislation
MI	18	Mich. Comp. Laws Ann. §750.137 (2003)
MN	18	Minn. Stat. Ann. §609.81 (Repealed 1996)
MS	-	No Legislation
MO	18	Mo. Ann. Stat. §568.070 (2003)
MT	18	Mont. Code Ann. §45-5-623 (2003)
NE	18	Neb. Rev. Stat. §69-210 (2003)
NV	18	Nev. Rev. Stat. §647.140 (2003)

NH	18	N.H. Rev. Stat. Ann. §398:2 (2003)
NJ	16	N.J. Stat. Ann. §45:22-31 (2003)
NM	18	N.M. Stat. Ann. §56-12-14 (2003)
NY	-	No Legislation
NC	-	No Legislation
ND	-	No Legislation
OH	18	Ohio Rev. Code Ann. §4727.10 (2003)
OK	18	Okla. Stat. Ann. tit. 59, §1511 (2003)
OR	18	Or. Rev. Stat. §726.270 (2001)
PA	18	Pa. Stat. Ann. tit. 63, §281-29 (2003)
RI	18	R.I. Gen. Laws §19-26-12 (2003)
SC	-	No Legislation
SD	-	No Legislation
TN	-	No Legislation
TX	18	Tex. Fin. Code §371.176 (2003)
UT	-	No Legislation
VT	18	Vt. Stat. Ann. tit. 9, §3870 (2003)
VA	-	No Legislation
WA	18	Wash. Rev. Code Ann. §19.60.066(3) (2004)
WV	-	No Legislation
WI	18	Wis. Stat. Ann. §948.63 (2003)
WY	-	No Legislation

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No. 03-633

JUL 19 2004

IN THE

Supreme Court of the United States

DONALD P. ROPER, Superintendent,
Potosi Correctional Center,

Petitioner,

v.

CHRISTOPHER SIMMONS,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF MISSOURI

BRIEF OF NEW YORK, IOWA, KANSAS, MARYLAND, MINNESOTA, NEW MEXICO, OREGON, AND WEST VIRGINIA AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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Stanford v. Kentucky,
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Ark. Code Ann. § 5-4-615 10

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705 Ill. Comp. Stat. 405/5-130	20
705 Ill. Comp. Stat. 405/5-125	19
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N.H. Rev. Stat. Ann. § 630:5(XIII)(1987)	7
N.J. Stat. Ann. § 2A:4A-26	20
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N.M. Stat. Ann. § 32A-2-20	20
N.M. Stat. Ann. § 32A-2-3(H)	20
N.C. Gen. Stat. § 7B-1604	20
N.C. Gen. Stat. § 7B-2200	20
N.C. Gen. Stat. § 14-17	9
N.D. Cent. Code § 27-20-34	20
Act of May 3, 1963, ch. 994, sec. 1, § 1045(3), 1963 N.Y. Laws 3018	11
Act of May 2, 1967, ch. 791, sec. 10, § 125.30(b), 1967 N.Y. Laws 2131, 2138	12
Act of May 17, 1974, ch. 367, sec. 2, § 60.06, 1974 N.Y. Laws 1209	12
Act of May 17, 1974, ch. 367, sec. 5, § 125.27(1)(b), 1974 N.Y. Laws 1209	12
1995 N.Y. Law 1	13
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2003 N.Y. Laws, ch. 174	22
N.Y. Penal Law § 10.00(18)	22
N.Y. Penal Law § 30.00	20, 21
N.Y. Penal Law § 30.00(1)	19, 22
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S.D. Codified Laws § 26-11-3.1 20

Tenn. Code Ann § 37-1-134 ..... 8, 20

Tex. Penal Code § 8.07(c) 9

Utah Code Ann. § 76-3-206 10

Utah Code Ann. § 78-3a-502(3) 10

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Vt. Stat. Ann. tit. 33 § 5505 20

Vt. Stat. Ann. tit. 33 § 5506 20

Va. Code Ann. § 16.1-269.1 20

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Wash. Rev. Code § 13.04.030 20

W. Va. Code Ann. § 49-5-10 20

Wis. Stat. Ann. § 938.183 20

2004 Wyo. Sess. Laws 29 ..... 8, 21

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Wyo. Stat. Ann. § 14-6-237 21

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MISCELLANEOUS

Bill Jacket, Act of May 17, 1974, 1974 Laws of New York, ch. 367, sec. 2, § 60.06, Office of Legislative Research, Feb. 1, 1974, "Capital Punishment: Can the Legislature Draft Constitutionally Acceptable Death Penalty Legislation" 12

1994 Kansas House Bill No. 2578 14

1994 Bill Tracking KS H.B. 2578 (LEXIS) 14

Floor Debate of the Assembly, 1995 Laws of New York, ch. 1, Bill No. 4843 (March 6, 1995) 13

New York State Legislative Annual 1995, Governor's Approval Memorandum #1 13

2003 Bill Tracking NH S.B. 513 (LEXIS) 7

2004 Bill Text SD S.B. 182 (LEXIS) 8

James R. Acker, When the Cheering Stopped: *An Overview and Analysis of New York's Death Penalty Legislation*, 17 Pace L. Rev. 41 (1996) 11, 18

Page

Jennifer A. Chin, Note: *Baby-Face Killers: A Cry for Uniform Treatment for Youths who Murder, from Trial to Sentencing*, 8 J.L. & Pol'y 287 (1999) 19

Patrick Griffon, National Center for Juvenile Justice, "National Overviews," *State Juvenile Justice Profiles*, *available at* http://www.ncjj.org/stateprofiles/ 19

Julian V. Roberts, *Public Opinion and Youth Justice*, 31 Crime & Just. 495 (2004) 18

Howard N. Snyder and Melissa Sickmund, United States Department of Justice, Office of Juvenile Justice and Delinquency Prevention, *Juvenile Offenders and Victims: 1999 National Report* (1999), *available at* http://www.ncjrs.org/html/ojjdp/nationalreport99/ (Sept. 1999) 18-19

Victor L. Streib, *Death Penalty for Juveniles* (1987) 9, 10

INTEREST OF AMICI CURIAE

Amici Curiae States urge affirmance of the Missouri Supreme Court's decision in *Simmons v. Roper*, 112 S.W.3d 397 (Mo. 2003) (en banc). That decision held that a national consensus forbidding execution of defendants who committed their crimes as 16- or 17-year-olds (hereinafter referred to as "juvenile offenders") has emerged in the fifteen years since this Court decided *Stanford v. Kentucky*, 492 U.S. 361 (1989), and that executing such persons therefore violates the Eighth Amendment's prohibition against cruel and unusual punishment.

Amici States New York, Iowa, Kansas, Maryland, Minnesota, New Mexico, Oregon, and West Virginia value highly the discretion accorded them by our federal system to punish crimes as they deem appropriate. Each State has crafted its own penal system to best protect the public safety of its citizens, in light of local concerns about crime and attitudes toward punishment. As part of this process, a number of Amici States, including New York, Kansas, Maryland, New Mexico, and Oregon have determined that capital punishment is essential to deterring particularly heinous crimes. These States have enacted statutes providing for the death penalty, and have vigorously defended their right to allow juries to impose it.

Amici States nonetheless recognize that the death penalty is subject to constitutional limitations that are grounded in the values of the nation's citizenry. As this Court has held, if an enduring national consensus emerges that a punishment is truly excessive, and thus inconsistent with evolving standards of decency, the Eighth Amendment precludes its continued use.

While the Court has held capital punishment itself to be constitutional under this measure, Amici States believe that the execution of offenders who were younger than 18 at the time they committed their crimes can no longer be sustained. It is their view that a national consensus, as evidenced by the enactments of state legislatures, has developed that is sufficiently widespread and consistent to preclude imposition of the death penalty on these offenders.

SUMMARY OF ARGUMENT

Under this Court's Eighth Amendment jurisprudence, a punishment is "cruel and unusual" if a consensus among the states forbids it. Fifteen years ago, this Court did not find such a consensus with regard to the execution of juvenile offenders; the day was yet to come "when there is such general legislative rejection" of these executions. *Stanford*, 492 U.S. at 381-82 (O'Connor, J., concurring).

Today, legislative rejection of juvenile executions is widespread, and legislatures that have changed their laws in recent years have moved in one direction. In the 15 years since *Stanford*, seven states plus the federal government have joined those states that previously prohibited juvenile executions, while no state has lowered its minimum age for capital punishment below 18. Today, 31 jurisdictions plus the federal government prohibit the execution of offenders who were less than 18 at the time they committed their crimes,[1] with 18 states explicitly setting 18 as the minimum age of eligibility.

1. Of those 31 jurisdictions, 12 states (Alaska, Hawaii, Iowa, Maine, Massachusetts, Michigan, Minnesota, North Dakota, Rhode Island, Vermont, West Virginia, and Wisconsin) do not permit the death penalty under any circumstances.

This legislative consensus likely will endure because it emerged after steady deliberation, over a long period of time – longer than that previously found by this Court to sufficiently reflect a national judgment. *See Atkins v. Virginia*, 536 U.S. 304 (2002). By 1989, the last time this Court considered the issue, 11 states already expressly prohibited juvenile executions.

A simultaneous trend in recent years toward tougher treatment of juvenile offenders confirms that the choice to bar these executions is deliberate and considered. As the states have moved toward prohibiting juvenile executions, they have also enacted stricter juvenile justice laws that expose juveniles to adult criminal liability. All of the 18 capital punishment states that expressly shield juvenile offenders from the death penalty require or allow juveniles charged with murder to be prosecuted as adults. That many states treat juveniles offenders like adults, but make an exception when it comes to capital punishment, reflects a considered judgment that death is inappropriate for juvenile offenders. This mitigates against any hazard of prematurely declaring juvenile executions "cruel and unusual."

ARGUMENT

AN ENDURING LEGISLATIVE CONSENSUS HAS EMERGED AGAINST EXECUTING JUVENILE OFFENDERS, RENDERING THESE EXECUTIONS UNCONSTITUTIONAL

While the government has significant discretion in the punishment of criminal offenders, the Eighth Amendment bars punishments that are "cruel and unusual" – that is, disproportionate when measured against "the evolving

standards of decency that mark the progress of a maturing society." *Atkins*, 536 U.S. at 311-12 (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)). In determining whether a punishment is disproportionate, "the clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures." *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989). When a "national consensus" against a punishment exists, this Court may conclude that its imposition violates the Eighth Amendment's guarantee. *Atkins*, 536 U.S. at 314-17.

As this Court has warned, there is peril in applying this standard. Societal judgments about a particular punishment may shift over time, both in opposition and in support, as the recent history of capital punishment demonstrates. Courts thus risk prematurely declaring a settled societal consensus against a punishment, thereby depriving States of the ability to later revive it. *See Thompson v. Oklahoma*, 487 U.S. 815, 854-55 (1988) (O'Connor, J., concurring) (noting risk that a "mistaken premise of the decision would [be] frozen into constitutional law, making it difficult to refute and even more difficult to reject"); *Atkins*, 536 U.S. at 345 (Rehnquist, J., dissenting). Caution is therefore appropriate to ensure that the Eighth Amendment does not become "a ratchet, whereby a temporary consensus on leniency for a particular crime fixes a permanent constitutional maximum, disabling the States from giving effect to altered beliefs and responding to changed social conditions." *Harmelin v. Michigan*, 501 U.S. 957, 990 (1991).

Mindful of this danger, this Court looks to several aspects of legislative acts to ensure that the Eighth Amendment is not used to constitutionalize a potentially fleeting public discomfort. The number of states that prohibit a particular

punishment is relevant. *See Stanford*, 492 U.S. at 370-72. Significance also lies in "the consistency of the direction of change." *Atkins*, 536 U.S. at 315-16. Additionally, the circumstances in which legislative determinations are made may indicate whether a judgment is likely to be enduring; for example, legislative prohibitions enacted gradually, over a long period of time, reflect the steady deliberation that should be present to invoke a constitutional bar against a punishment. *See Coker v. Georgia*, 433 U.S. 584, 593-94 (1977) (describing trend over fifty years toward barring capital punishment for rape of an adult woman). Likewise, prohibiting the imposition of a particular punishment, such as the death penalty, on a class of offenders that is otherwise exposed to tough treatment in the criminal justice system indicates a considered judgment that the punishment would be disproportionate as applied to those individuals. *Thompson*, 487 U.S. at 826-29.

The present legislative consensus against executing juvenile offenders has these hallmarks of an enduring national judgment. It is significantly more substantial than the legislative activity rejected as a basis for consensus in *Stanford*, and of longer vintage than the legislative determinations relied upon in *Atkins*. Accordingly, this Court should declare the consensus against the juvenile death penalty sufficiently broad to bar these executions.

I. The Legislative Consensus Against Executing Juvenile Offenders Is Widespread

A. *Thirty-One Jurisdictions Plus the Federal Government Bar the Execution of Juvenile Offenders*

This Court has twice addressed the question of when a legislative consensus is so broad as to place the execution of juvenile offenders beyond modern standards of decency. In 1988, a plurality of the Court held that imposing the death penalty on offenders who were 15 years old or younger at the time of their crimes had become "generally abhorrent to the conscience of the community." *Thompson v. Oklahoma*, 487 U.S. 815, 832 (1988). At that time, all 18 of the states that set minimum ages for the death penalty prohibited execution of offenders who were under 16 when they committed their crimes. *Id.* at 829 n.30. Nineteen other states set no minimum age for the death penalty, though some of them permitted criminal prosecution of offenders who were under 16 at the time of their crimes, thereby theoretically exposing these offenders to capital punishment. *Id.* at 826-27, 826 n.24. In the Court's view, these legislative judgments, coupled with a demonstrated reluctance by juries to sentence offenders who were under 16 at the time of their crimes to death, evidenced a national consensus against such executions.

In 1989, however, the Court concluded that a similar consensus barring execution of offenders who were 16 or 17 years old at the time of their crimes had not yet emerged. *Stanford*, 492 U.S. at 380. At that time, 11 of the 37 states that authorized capital punishment prohibited executing these

offenders;[2] seven expressly permitted it; and 19 set no minimum age for the death penalty but set the age of adult criminal liability at less than 18. *Id.* at 370-71.

In 1989, the Court also declined to declare a settled consensus against executing mentally retarded offenders, noting that only two states prohibited these executions. *See Penry*, 492 U.S. at 334. But it reached the opposite conclusion 13 years later, in *Atkins v. Virginia*, 536 U.S. 304 (2002). By that time, 18 states prohibited imposition of the death penalty on mentally retarded defendants, and in the years since *Penry*, no state had reauthorized these executions. *Atkins*, 536 U.S. at 314-16.

Today, 18 States expressly prohibit the execution of juvenile offenders,[3] the same number that constituted a

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2. In *Stanford* (as well as *Thompson*), the Court counted New Hampshire as one of the states that had set 18 as the minimum age for the death penalty, making the total number of such states 12. *See Thompson*, 487 U.S. at 829 n.30; *Stanford*, 492 U.S. at 370 n.2. New Hampshire's law, however, was not clear. *Compare* N. H. Rev. Stat. Ann. § 630:5(XIII)(1987)(prohibiting execution of one who was a minor at time of crime) and § 21-B:1 (age 18 is the age of majority) *with* § 630:1(V) (providing that no one under age 17 shall be held culpable of a capital offense). Subsequent legislative activity made clear that New Hampshire actually drew the line at 17, not 18. In 2004, a bill to raise the age to 18 passed both houses of the Legislature but was vetoed by the governor. *See* 2003 Bill Tracking NH S.B. 513.

3. Those states are California, Colorado, Connecticut, Illinois, Indiana, Kansas, Maryland, Montana, Nebraska, New Jersey, New Mexico, New York, Ohio, Oregon, South Dakota, Tennessee, Washington, and Wyoming. *See* Cal. Penal Code § 190.5; Colo. Rev.

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"national consensus" against executing other classes of offenders in both *Thompson* and *Atkins*. *Thompson*, 487 U.S. at 829; *Atkins*, 536 U.S. at 314-15. Since this Court decided *Stanford*, six more states (Indiana, Kansas, Montana, New York, South Dakota, and Wyoming) and the federal government have joined the 11 states that expressly exempted offenders who were less than 18 at the time of their crimes from capital punishment in 1989. *See* Ind. Code Ann. § 35-50-2-3; Kan. Stat. Ann. § 21-4622; Mont. Code Ann. § 45-5-102; N.Y. Penal Law § 125.27; S.D. Codified Laws § 23A-27A (pending amendment 2004); 2004 Bill Text SD S.B. 182; 2004 Wyo. Sess. Laws 29; 18 U.S.C. § 3591(a)(2)(D) ("Federal Death Penalty Act of 1994"). A seventh state, Washington, has imposed the same exemption through judicial act and legislative acquiescence: following *Thompson*, the Washington Supreme Court construed the state's statutory framework to disallow capital punishment of juvenile offenders, a conclusion lawmakers have not rejected through subsequent legislation. *See State v. Furman*, 858 P.2d 1092, 1102-03 (Wash. 1993). Twelve more states, plus the District of Columbia, do not permit the death penalty under any circumstances.[4] Thus, juveniles may

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Stat. § 18-1.4-102; Conn. Gen. Stat. Ann. § 53a-46a(h); 720 Ill. Comp. Stat. 5/9-1(b); Ind. Code Ann. § 35-50-2-3; Kan. Stat. Ann. § 21-4622; Md. Code Ann. Crim. Law § 2-202(b)(2)(i); Mont. Code Ann. § 45-5-102; Neb. Rev. Stat. § 28-105.01; N.Y. Penal Law § 125.27; Ohio Rev. Code Ann. § 2929.02; Or. Rev. Stat. §§ 161.620, 137.707; S.D. Codified Laws § 23A-27A, *amended by* 2004 Bill Text SD S.B. 182; Tenn. Code Ann § 37-1-134; *State v. Furman*, 858 P.2d 1092 (Wash. 1993); 2004 Wyo. Sess. Laws 29.

4. These states include Alaska, Hawaii, Iowa, Maine, Massachusetts, Michigan, Minnesota, North Dakota, Rhode Island, Vermont, West Virginia, and Wisconsin.

not be executed in a total of 31 jurisdictions plus the federal government (not counting Missouri), while only seven states (again not counting Missouri) explicitly permit these executions through legislative acts.[5]

Twelve other states set the age of adult criminal liability at less than 18, but set no minimum age by statute for imposing the death penalty.[6] Petitioner claims that because

5. Of these seven states, four allow the death penalty to be imposed only at 17. *See* Ga. Code Ann. § 17-9-3; N.H. Rev. Stat. Ann. § 630:1 (V); N.C. Gen. Stat. § 14-17; Tex. Penal Code § 8.07(c). The remaining three allow its imposition at 16. *See* Ky. Rev. Stat. Ann. § 640.040; Nev. Rev. Stat. § 176.025; Va. Code. Ann. § 18.2-10. Among these seven, neither Kentucky nor New Hampshire has any juveniles on death row. In fact, Kentucky has not executed a juvenile since 1945 and New Hampshire has never executed a juvenile offender. *See* Victor L. Streib, *Death Penalty for Juveniles*, Appendix at 196, 200 (1987).

6. *See* Ala. Code §§ 12-15-34, 12-15-34.1 (prosecuting juveniles as adults), § 15-18-1 (death penalty); Ariz. Rev. Stat. § 13-501 (prosecuting juveniles as adults), § 13-703 (death penalty); Ark. Code Ann. § 9-27-318 (prosecuting juveniles as adults), §§ 5-4-601 to 5-4-603 (death penalty), § 5-10-101 (capital murder); Del. Code Ann. tit. 10, § 1010 (prosecuting juveniles as adults), tit. 11, § 4209 (death penalty); Fla. Stat. Ann. § 985.226 (prosecuting juveniles as adults), § 985.225 (juveniles eligible for capital punishment) *Brennan v. State*, 754 So. 2d 1 (Fla. 1999) (prohibiting execution of offenders who were less than 17 at the time of their crimes); Idaho Code §§ 20-508, 20-509 (prosecuting juveniles as adults), § 18-4004 (death penalty); La. Child. Code art. 305, 857 (prosecuting juveniles as adults), La. Rev. Stat. Ann. § 14:30 (death penalty); Miss. Code Ann. §§ 43-21-151, 43-21-157 (prosecuting juveniles as adults), § 97-3-21 (death penalty); Okla. Stat. tit. 10, §§ 7306-1.1, 7306-2.6 (prosecuting juveniles as adults), tit. 21, § 701.10 (death penalty);
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the laws of these states theoretically expose 16- and 17-year-olds to capital punishment, they should be considered supporters of the juvenile death penalty. *See* Pet'r Br. at 25. But for at least four of these states, that characterization is dubious. Arkansas, Delaware, Idaho, and Utah all permit adult criminal prosecution of some juvenile offenders as young as 14, and their death penalty statutes contain no age minimum.[7] However, Arkansas' last juvenile execution was in 1927, Delaware's was in 1891, and Utah's last and only juvenile execution occurred in 1869. *See* Victor L. Streib, *Death Penalty for Juveniles*, Appendix at 192-93, 206 (1987). Idaho has never executed a juvenile offender. *See id.* at 195. These states therefore have not had any reason to legislate against juvenile executions, and no support for such punishment can be inferred from their legislative inertia. *See Atkins*, 536 U.S. at 316 ("Some states . . . continue to authorize executions [of the mentally retarded], but none have been carried out in decades. Thus there is little need to pursue legislation barring the execution of the mentally retarded in those states.").

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42 Pa. Cons. Stat. § 6355 (prosecuting juveniles as adults), 18 Pa. Cons. Stat. § 1102 (death penalty); S.C. Code Ann. §§ 20-7-6605, 20-7-7605 (prosecuting juveniles as adults), § 16-3-20 (death penalty); Utah Code Ann. §§ 78-3a-502, 78-3a-601, 78-3a-602 (prosecuting juveniles as adults), § 76-3-206 (death penalty).

7. *See* Ark. Code Ann. § 9-27-318 (juvenile transfer), § 5-4-615 (death penalty); Del. Code Ann. tit. 10, § 1010 (adult prosecution of juveniles), Del. Code Ann. tit. 11, § 4209 (death penalty); Idaho Code § 20-508 (juvenile waiver), § 18-4004 (death penalty); Utah Code Ann. § 78-3a-502(3) (juvenile waiver), § 76-3-206 (death penalty).

B. *Recent Enactments by the New York and Kansas Legislatures Reflect a Judgment By Those States Against Executing Juvenile Offenders*

In attempting to distinguish the breadth of the current legislative consensus against executing juvenile offenders from the consensus identified in *Atkins* against executing mentally-retarded offenders, petitioner suggests that recent enactments by New York and Kansas do not reflect deliberate legislative judgments on this point. *See* Pet'r Br. at 22-23. In *Thompson*, this Court characterized both states as not authorizing capital punishment at all in light of judicial decisions that had invalidated their death penalty schemes. *See* 487 U.S. at 826 n.25. For this reason, in *Stanford* the Court excluded New York and Kansas from the group of states that had made judgments against executing juveniles. 492 U.S. at 371. But now, as the Missouri Supreme Court recognized, both states must be counted as joining the consensus against juvenile executions that has emerged since that time.

New York has prohibited these executions for decades. In 1963, the New York Legislature enacted a statute expressly prohibiting the execution of minors, which was patterned after a provision of the Model Penal Code intended to make only those offenders who were 18 or older when they committed their crimes eligible for capital punishment. *See* Act of May 3, 1963, ch. 994, sec. 1, § 1045(3), 1963 N.Y. Laws 3018 (prohibiting imposition of death sentences on persons who committed their crimes when they were "under eighteen years of age"); James R. Acker, *When the Cheering Stopped: An Overview and Analysis of New York's Death Penalty Legislation*, 17 Pace L. Rev. 41, 50 (1996). This age limitation was retained through subsequent

amendments to New York's death penalty statute that were enacted in 1965 and 1967.[8]

Following this Court's decision in *Furman v. Georgia*, 408 U.S. 238 (1972), New York's death penalty scheme was declared unconstitutional. *See People v. Fitzpatrick*, 32 N.Y. 499 (1973). In an effort to remedy the defect identified in *Furman* and *Fitzpatrick*, the New York Legislature enacted a new statute that imposed a mandatory death sentence for first-degree murder. *See* Act of May 17, 1974, ch. 367, sec. 2, § 60.06, 1974 N.Y. Laws 1209, 1209. In doing so, the Legislature retained a minimum age of 18 at the time of the crime's commission for the death penalty, but included this age restriction as one of the elements of first-degree murder, rather than as a free-standing prohibition – thereby reinforcing the judgment made 11 years earlier that capital punishment should be unavailable for offenders who were under 18 at the time of their crimes. *See id.* sec. 5, § 125.27(1)(b). The Legislature did not question whether the age requirement was appropriate: of the 29 death penalty bills introduced in 1973 (some of which were also reintroduced in 1974), none sought to lower the minimum age. *See* Bill Jacket, Act of May 17, 1974, 1974 Laws of New York, ch. 367, sec. 2, § 60.06, Office of Legislative Research, Feb. 1, 1974, "Capital Punishment: Can the Legislature Draft Constitutionally Acceptable Death Penalty Legislation" at 1.

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8. The 1967 amendment changed the wording of the age limitation slightly, to exclude defendants who were "more than eighteen years old at the time of the commission of the crime." Act of May 2, 1967, ch. 791, sec. 10, § 125.30(b), 1967 N.Y. Laws 2131, 2138. Apparently no change in the age of eligibility itself was intended. *See People v. Mower*, 280 A.D.2d 25, 28 (3d Dept. 2001) (interpreting "more than eighteen" as eighteen or more).

This revised death penalty regime was subsequently declared unconstitutional as well. *See People v. Davis*, 43 N.Y.2d 17 (1977). Thereafter, for eighteen consecutive years, the New York Legislature passed bills re-authorizing capital punishment, each of which fell to gubernatorial veto. *See* N.Y. State Legislative Annual, 1995, at 22-23. A newly-elected governor finally signed a death penalty bill into law in 1995. *See* 1995 Laws of New York, ch. 1 (S. 2850, A. 4843), March 7, 1995.

Contrary to petitioner's characterization, the 1995 statute does reflect a considered judgment against executing juvenile offenders. The statute significantly expands the categories of death-eligible offenders, *see* N.Y. Penal Law § 125.27, indicating that the Legislature made conscious choices about the appropriate scope of the death penalty and deliberately excluded juvenile offenders.

Legislative history confirms that this was precisely the Legislature's intent. *See* Floor Debate of the Assembly, Bill No. 4843 (March 6, 1995) at 126 ("[I]n the past, we have discussed who, in fact, from an age standard, should be subject to the death penalty, and this bill, about to become law, says no one under 18."); 210 ("You see there's a specific section in here that says you must be 18 or older . . . so we we're not going to kill our children and make them subject to the death penalty."); 529 ("[U]nder this bill, no one under 18 can be executed."); *see also* Governor's Approval Memorandum #1, N.Y. State Legislative Annual, 1995 at 23 (describing the bill as imposing the death penalty on only those above the age of 18); Assembly Codes Committee Memorandum, N.Y. State Legislative Annual, 1995 at 1, 3 (recognizing 18 as the minimum age for death penalty eligibility); Acker, *supra*, at 50. That there was no debate as

to the age limitation actually reflects broad agreement, not a lack of concern about the issue. Given these clear indicia of a considered legislative judgment, New York plainly should be counted as part of a national consensus against executing juvenile offenders.[9]

Missouri also suggests that this Court should discount Kansas, which, like New York, had no death penalty when *Stanford* was decided but has since rejoined the capital punishment states. *See* Kan. Stat. § 21-3439 (1994). Missouri asserts that the Kansas Legislature "did not deal specifically with offenders under eighteen." Pet'r Br. at 22. This is untrue. The original draft of the 1994 death penalty bill set the minimum age at 16. *See* Memorandum of Mary Ann Torrance, Assistant Revisor of Statutes (Kansas) to Kansas House Committee on Federal and State Affairs, "Provisions of House Bill No. 2578" (January 25, 1994). Legislators raised the minimum age to 18 by a committee vote during debate. *See* Minutes of the House Committee on Federal and State Affairs, February 7, 1994. The bill, as amended, passed a few days later. 1994 Kansas House Bill No. 2578; *see also* 1994 Bill Tracking KS H.B. 2578. The amended bill not only shielded juvenile offenders, *see* Kan. Stat. § 21-4622 (1994), but also in so doing reaffirmed a long-standing legislative

9. On June 24, 2004, the New York Court of Appeals invalidated, on state constitutional grounds, a charge given to capital juries regarding the impact of a deadlock, because the charge impermissibly interjects considerations of future dangerousness into the sentencing decision and could lead to coerced and potentially arbitrary death sentences. It further held that a jury deadlock charge is required in a capital case pursuant to the state due process clause, and concluded that the defect in the existing statute could only be cured by a new instruction from the State Legislature. *People v. LaValle*, No. 71, 2004 N.Y. LEXIS 1575 (June 24, 2004).

judgment that reaches back as far as Kansas' 1935 death penalty statute, which exempted juvenile offenders from the death penalty. *See* Kan. Gen. Stat. § 21-403 (1935) (repealed 1969).

II. The Emergence of the Legislative Consensus Against Executing Juvenile Offenders Has Been Gradual and Consistent

Petitioner attempts to dilute the significance of the legislative consensus against executing juvenile offenders by claiming that the direction of change among the states has been inconsistent. To the contrary, this consensus has emerged over a long period of time and has moved uniformly in one direction since *Stanford*. Not a single state that had a minimum age for capital punishment when this Court decided *Stanford* has lowered that age in the ensuing fifteen years.

The gradual nature of the shift in legislative judgments about executing juvenile offenders is noteworthy because it reflects steady deliberation over decades about this issue – surely a hallmark of a consensus that will endure. When legislative enactments are of recent vintage, a court may ask whether they reflect merely a temporary swing in public opinion, rather than a settled judgment of constitutional magnitude. *See Atkins*, 536 U.S. at 344 (Scalia, J., dissenting) (noting that state legislation prohibiting execution of mentally retarded offenders is "in its infancy" and thus "[f]ew, if any, of the States have had sufficient experience with these laws to know whether they are sensible in the long term"). The legislative prohibitions against executing juvenile offenders are of significantly longer duration than the legislative determinations relied upon to invoke an Eighth Amendment bar in *Atkins*. There, five of the 18 statutes found to constitute a national consensus against executing mentally

retarded offenders had been enacted in the year before the Court's decision; over half had been enacted in the previous eight years; and all had been enacted within the previous 14 years. *Id*. In contrast, by 1989 eleven states already had statutes barring execution of juvenile offenders.

Nor has the shift in public opinion since *Stanford* been inconsistent. In support of its argument on this point, petitioner refers to four states – Arizona, Florida, Virginia, and Missouri itself. *See* Pet'r Br. at 25-26. The legislative acts in these states, however, do not demonstrate a reversal in position as to whether offenders who were less than 18 when they committed their crimes should be executed.

In 1996, Arizona's voters amended their state constitution to mandate adult criminal prosecution for juveniles fifteen and older who are accused of murder and other specified violent offenses. *See* Ariz. Const. art. 4, pt. 2, § 22(1). The amendment made no mention of the death penalty. *Id*. Many states, including New York, have similar and even stricter provisions mandating adult prosecution, but as discussed in Point III, *infra*, such provisions do not necessarily reflect legislative support for executing juveniles. In fact, the Arizona Supreme Court overturned a death sentence imposed on a 16-year-old offender pursuant to the Arizona transfer provision, concluding that, under *Stanford*, this statute was unconstitutional insofar as it permitted prosecutors to seek the death penalty for juveniles without an individualized pre-trial assessment of the defendant's maturity. *State v. Davolt*, 84 P.3d 456, 480-81 (Ariz. 2004).

Nor does Florida's Legislature appear to have signaled any support for executing juvenile offenders. As petitioner points out, in 1994 the Florida Supreme Court invalidated a

15-year-old offender's death sentence as violative of the Florida Constitution's prohibition on "cruel *or* unusual" punishment, on the ground that such executions were "unusual." *Allen v. State*, 636 So. 2d 494 (Fla. 1994). That court later held that the same provision barred executions of offenders who were under seventeen at the time of their crimes on the same basis. *Brennan v. State*, 754 So. 2d 1, 7-8 (Fla. 1999). In 2002, Florida voters amended their state constitution to conform its standard to the federal Eighth Amendment. *See* Florida Const. art. I, § 17 (2004) ("The prohibition against cruel or unusual punishment, and the prohibition against cruel and unusual punishment, shall be construed in conformity with decisions of the United States Supreme Court which interpret the prohibition against cruel and unusual punishment provided in the Eighth Amendment to the United States Constitution."). While claiming that this amendment reveals a preference for allowing the execution of juvenile offenders, petitioner offers no evidence of this motivation. *See* Pet'r Br. at 26-27. Notably, the Florida Legislature has not lowered the minimum age for imposition of the death penalty to 16, even though it could have done so following *Stanford*.

As for Virginia, it had no minimum age for capital punishment when *Thompson* and *Stanford* were decided, and in 2000 Virginia's Legislature simply made explicit that state's prior practice of allowing the execution of 16- and 17-year-old offenders. *See* Va. Code Ann. § 18.2-10(a) (amended in 2000). The Missouri Legislature passed a similar law in 1994, *see* Mo. Rev. Stat. § 565.020.2, the constitutionality of which is at issue here. While these enactments certainly reveal support for executing juvenile offenders, they do not represent a shift in the policies of those states since *Stanford*.

III. A Simultaneous Trend Toward Tougher Treatment of Juvenile Offenders Confirms That the Choice to Bar Execution of Juvenile Offenders Is Deliberate And Considered

In recent years, numerous states have drastically toughened their treatment of juvenile offenders by lowering the age at which these offenders may be tried and sentenced as adults. At the same time, however, there has been a trend in many of these states toward explicitly prohibiting execution of these offenders. This dynamic suggests first, that explicit legislative prohibitions against the juvenile death penalty are deliberate and considered, and second, that states which expose juvenile offenders to the death penalty solely by virtue of placing them in the criminal justice system should not be viewed as having expressed any judgment on the execution of these offenders.

In the 1990s, many states enacted stricter juvenile justice laws in response to a perceived juvenile crime crisis. *See* Howard N. Snyder and Melissa Sickmund, United States Department of Justice, Office of Juvenile Justice and Delinquency Prevention, *Juvenile Offenders and Victims: 1999 National Report* 89 (1999), *available at* http://www.ncjrs.org/html/ojjdp/nationalreport99/ (Sept. 1999) (hereinafter *Juvenile Offenders and Victims*) (describing the 1990s as "a time of unprecedented change as State legislatures crack[ed] down on juvenile crime"). While prior laws had focused on rehabilitation of juvenile offenders and provided separate courts for juveniles, the new movement emphasized punishment and deterrence. *See* Julian V. Roberts, *Public Opinion and Youth Justice*, 31 Crime & Just. 495, 521 (2004); Jennifer A. Chin, *Note: Baby-Face Killers: A Cry for Uniform Treatment for Youths who Murder, from Trial to Sentencing*, 8 J.L. & Pol'y 287, 292-95 (1999).

As a result, all states now place at least some juvenile offenders in the adult criminal justice system. Between 1992 and 1997 alone, forty-five states passed laws making it easier to transfer offenders who are less than 18 to the adult criminal justice system. *See Juvenile Offenders and Victims* at 89, 104. Legislatures in 18 states expanded the scope of transfer laws still more between 1998 and 2002. Patrick Griffon, National Center for Juvenile Justice, "National Overviews," *State Juvenile Justice Profiles*, *available at* http://www.ncjj.org/stateprofiles/ (last visited July 19, 2004). Today, juvenile court judges in nearly all states may transfer matters to adult criminal courts, sometimes even for children as young as ten or twelve. *See Juvenile Offenders and Victims* at 104; *see also* Vt. Stat. Ann. tit. 33 §§ 5506, 5505 (permitting transfer of children as young as 10); Colo. Rev. Stat. § 19-2-518(1)(a)(I)(A) (permitting adult prosecutions of certain 12-year-olds); Mont. Code Ann. § 41-5-206(1)(a)(same). Some states have divested the juvenile courts of jurisdiction altogether for offenders of a certain age or for certain types of crimes, making transfer unnecessary. Connecticut, New York, and North Carolina, for example, automatically treat all offenders 16 and older as adults, regardless of their alleged crimes. *See* Conn. Gen. Stat. § 46b-120; N.Y. Penal Law § 30.00(1); N.C. Gen. Stat. § 7B-1604. Currently, statutes in over 30 states exclude at least some categories of juvenile offenders from prosecution in juvenile courts.[10]

10. *See, e.g.*, Ala. Code § 12-15-34.1; Cal. Wel. & Inst. Code § 602b; Fla. Stat. Ann. § 985.226; Ga. Code Ann. § 15-11-28(b)(2)(A); Idaho Code § 20-509; 705 Ill. Comp. Stat. 405/5-805(1), 405/5-125; Ind. Code Ann. § 31-30-1-4; Iowa Code § 232.8; La. Child. Code art. 305; Md. Cts. & Jud. Proc. § 3-8A-03; Mass. Gen. Laws ch. 119, § 74; Minn. Stat. §§ 260B.007(6)(b), 260B.101(2); Miss. Code Ann. § 43-21-151; Mont. Code Ann. (Cont'd)

Many states have also stiffened the sentences applicable to juveniles; 16 states now require mandatory minimum terms of incarceration for some juvenile offenders. *Juvenile Offenders and Victims* at 89, 108 (describing enactments during period between 1992 and 1997).

While many states thus have indicated their willingness to hold more juvenile offenders criminally liable at younger ages, the converse has been true about their willingness to allow the execution of juvenile offenders. All of the 18 capital punishment states that expressly shield juvenile offenders from the death penalty require or allow juveniles charged with murder to be prosecuted as adults.[11] Some of these states have particularly long-standing prohibitions against executing juvenile offenders. For example, California

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§ 41-5-206(2); Nev. Rev. Stat. § 62B.330(3); N.M. Stat. Ann. § 32A-2-3(H); N.Y. Penal Law § 30.00; N.C. Gen. Stat. § 7B-2200; N.D. Cent. Code § 27-20-34; Ohio Rev. Code Ann. §§ 2152.10, 2152.12; Okla. Stat. tit. 10 § 7306-1.1; Or. Rev. Stat. § 137.707; 42 Pa. Cons. Stat. Ann. § 6355(e); R.I. Gen. Laws § 14-1-5; S.C. Code Ann. §§ 20-7-6605, 20-7-7605; S.D. Codified Laws § 26-11-3.1; Utah Code Ann. § 78-3a-601; Vt. Stat. Ann. tit. 33 § 5502; Va. Code Ann. § 16.1-269.1; Wash. Rev. Code § 13.04.030; W. Va. Code Ann. § 49-5-10; Wis. Stat. Ann. § 938.183.

11. *See* Cal. Welf. & Inst. Code § 602; Colo. Rev. Stat. §§ 19-2-518, 18-1.3-406; Conn. Gen. Stat. § 46b-127(a); 705 Ill. Comp. Stat. 405/5-130; Ind. Code Ann. § 31-30-3-5; Kan. Stat. Ann. § 38-1636; Md. Cts. & Jud. Proc. § 3-8A-03(d)(1); Mont. Code Ann. § 41-5-206; Neb. Rev. Stat. § 43-247; N.J. Stat. Ann. § 2A:4A-26; N.M. Stat. Ann. §§ 31-18-15.2(A), 32A-2-20; N.Y. Penal Law § 30.00; Ohio Rev. Code Ann. § 2152.10; Or. Rev. Stat. § 137.707; S.D. Codified Laws § 26-11-3.1; Tenn. Code Ann. § 37-1-134; Wash. Rev. Code § 13.04.030; Wyo. Stat. Ann. § 14-6-203.

mandates adult prosecution of teens as young as 14, *see* Cal. Wel. & Inst. Code § 602(b), but has barred execution of juvenile offenders since 1921. *See People v. Davis*, 176 Cal. Rptr. 521, 528 (Cal. 1981). Colorado, which has prohibited execution of juvenile offenders since 1901, *see* Act of May 2, 1901, § 6, 1901 Colo. Sess. Laws 155-56, permits adult prosecution of children as young as 12. Colo. Rev. Stat. § 19-2-518.

Even more significantly, a number of the states that recently stiffened penalties for juveniles have, at the same time, *increased* to 18 the minimum age of commission of a crime for which an offender may be death-eligible. For example, Indiana enacted a statute in 1997 permitting the transfer to the adult system of children as young as 10 who are accused of murder. Ind. Code Ann. § 31-30-3-4. But in 2002, it also prohibited the execution of juvenile offenders, raising the minimum age of offense for death penalty eligibility from 16 to 18. Ind. Code Ann. § 35-50-2-3(b)(1)(A). Similarly, Kansas, which explicitly exempted offenders who committed their crimes at less than 18 when it reinstated the death penalty in 1994, Kan. Stat. Ann. § 21-4622, permits adult prosecution of children as young as 10, Kan. Stat. Ann. §§ 38-1602(a), 38-1636. Wyoming, another state that recently banned the death penalty for offenders under 18, 2004 Wyo. Sess. Laws 29, permits adult criminal prosecution of children as young as thirteen, Wyo. Stat. §§ 14-6-203, 14-6-237.

New York, too, has been increasingly tough on juvenile offenders, while reaffirming its position against executing these offenders. Since 1965, 16- and 17-year-old offenders have been prosecuted automatically as adults in New York. N.Y. Penal Law § 30.00(1). In 1978, New York extended this

policy to younger teens, mandating that in the absence of a waiver, 13-year-olds charged with second degree murder automatically face adult criminal liability, as do 14-year-olds charged with a variety of crimes, including kidnaping, manslaughter, rape, arson, and robbery. N.Y. Penal Law §§ 10.00(18), 30.00(2); *see also* 1998 N.Y. Laws 3282 (providing for automatic adult criminal prosecution of 14-year-olds charged with possession of a loaded firearm on school grounds). Additionally, in 2003, New York raised the minimum sentence for 14- and 15-year old offenders convicted of second degree murder to 7½ to fifteen years; the maximum sentence for these offenders remains life in prison. N.Y. Penal Law § 70.05; 2003 N.Y. Laws, ch. 174. Thus, the New York Legislature has decided that juvenile offenders may spend the rest of their lives in prison, but it is not permissible to execute them.

The combination of these two trends in New York, as well as in a number of other states, provides compelling evidence that legislative judgments against executing juvenile offenders are considered ones. Many states treat juvenile offenders just as they do adults, but make an exception when it comes to the death penalty. The deliberateness of this choice indicates that the consensus against these executions will be enduring, and thus they may appropriately be prohibited under the Eighth Amendment.

It also suggests that the decision to lower the age at which juvenile offenders may or even must be treated as adults says nothing conclusive about a legislature's view of the minimum age at which they may be executed. In finding that no consensus against the juvenile death penalty existed in *Stanford*, this Court relied on the assumption, first set forth in *Thompson*, that when a legislature lowers the age at which

a juvenile offender may be tried as an adult, it necessarily intends that the offender also be exposed to the death penalty. *See Thompson*, 487 U.S. at 867-68 (Scalia, J. dissenting); *Stanford*, 492 U.S. at 370, 371 n.3; *id.* at 381 (O'Connor, J., concurring). But as Justice O'Connor noted in *Thompson*, "[t]here are many reasons, having nothing whatsoever to do with capital punishment, that might motivate a legislature to provide as a general matter for some 15-year-olds to be channeled into the adult criminal justice process." 487 U.S. at 850 (O'Connor, J., concurring).

The experiences of the Amici States and of the nation as a whole in the 15 years since *Stanford* demonstrate that this Court need not fear that invalidating the juvenile death penalty now will prematurely constrain the states. If ever there were a period in which states, looking for ways to treat juvenile offenders more harshly, might have considered reducing the age at which offenders become death-eligible, it was the period following *Stanford*. And yet, uniformly, the states made no such move. Their mutual decisions to draw the line at death, even where public opinion supported tough punishment of juvenile offenders and legislatures responded accordingly, suggest that the consensus baseline of 18 is immovable.

CONCLUSION

For the foregoing reasons, the Amici States urge this Court to affirm the decision of the Missouri Supreme Court.

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IN THE
SUPREME COURT OF THE UNITED STATES

DONALD P. ROPER,
Petitioner,

v.

CHRISTOPHER SIMMONS,
Respondent.

On Writ of Certiorari to the
Supreme Court of Missouri

BRIEF *AMICI CURIAE* OF THE UNITED STATES CONFERENCE OF CATHOLIC BISHOPS AND OTHER RELIGIOUS ORGANIZATIONS IN SUPPORT OF RESPONDENT

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OTHER AUTHORITIES:

Abd al-Fattah Kabbarah, Al-Fiqh al-Muqaran ([Islamic] Comparative Jurisprudence) (Beirut: Dar al-Nafa'is, 1997), 33 Al-Mawsu'ah al-Fiqhiyyah (Encyclopedia of Islamic Jurisprudence) (Kuwait: Ministry of Awqaf [Religious Endowments], (1995)..... 19

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INTEREST OF *AMICI*

Representatives of widely diverse religious communities in the United States – reflecting Christian, Jewish, Muslim, and Buddhist traditions – unite here as amici curiae on behalf of the Respondent, Christopher Simmons.[1] These amici have differing views about the death penalty in general. Some object to it in principle, opposing it at all times and in all circumstances; others do not. Notwithstanding highly nuanced differences in theology and moral outlook, all of these amici share the conviction that the execution of persons for crimes they committed as juveniles cannot be morally justified.[2] In our view, such executions violate the standards of decency of American society and the Eighth Amendment guarantee against cruel and unusual punishment.

Individual statements of interest are provided in the Appendix to this Brief.

SUMMARY OF ARGUMENT

If there once was any doubt about the relevance of the views of the religious community in deciding the constitutionality of certain punishments, it was removed by this Court's decision in *Atkins v. Virginia*, 536 U.S. 304 (2002). There a majority of this Court made clear that the views of religious organizations are

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[1] Pursuant to this Court's Rule 37.6, counsel for a party did not author this Brief in whole or in part. No person or entity, other than the United States Conference of Catholic Bishops, made a monetary contribution to the preparation or submission of this Brief. The parties have consented to the filing of this Brief. Letters of consent are filed herewith.

[2] For convenience, the amici will use "juvenile death penalty," "juvenile executions," and "juvenile offenders" as shorthand for such cases and persons.

"[a]dditional evidence" (536 U.S., at 316 n.21) of a broad social and professional consensus against the imposition of the death penalty for a particular class of persons.

This case bears many similarities to *Atkins* because it involves a class of offenders who, because of their age, lack the degree of culpability that would place them in the category this Court has described as those "most deserving" (*id.* at 319) to be put to death. Juveniles lack the psychological maturity and development of adults. Anecdotal evidence suggests that when juveniles do engage in serious crimes, it is almost always attended by mitigating circumstances, such as early and continual exposure to violence and family and social disruption. Society holds great hope for the reform of wayward youth.

As put by one of the amici (*see* discussion *infra* at 26), children are not miniature adults, and no other area of law treats them as such. Indeed, allowing the death penalty for juveniles permits a radical inconsistency in the law to persist because, in virtually every area of law, a person's youthfulness is taken into account unless the state is contemplating the ultimate question of whether to take his or her life. This anomaly, in which a blind eye is turned to the immaturity of youth when that immaturity is most relevant and its consequences most severe, cannot be reconciled with our nation's evolving moral sense about what is right and just in contemporary America.

The amici may have many different views about crime and punishment, but they converge in their answer to the question of whether contemporary standards of decency can allow the execution of juvenile offenders. All their traditions, different though they be, point to the same answer.

The answer is, and must be, no.

ARGUMENT

I. WHY THE VIEWS OF THE RELIGIOUS COMMUNITY ARE RELEVANT

The Eighth Amendment guarantee against cruel and unusual punishment "is not fastened to the obsolete," *Weems v. United States*, 217 U.S. 349, 378 (1910), or to be judged by "the standards that prevailed in 1685 when Lord Jeffreys presided over the 'Bloddy Assizes' or when the Bill of Rights was adopted," *Atkins v. Virginia*, 536 U.S. 304, 311 (2002), but rather draws its meaning "from the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality).

The process of deciding what is cruel and unusual is therefore not a mechanical one, but contemplates that the Court's "own judgment" will be brought to bear on the question. *Atkins*, 536 U.S., at 312. In exercising its judgment, this Court has consulted many sources, including the views of the religious community, in deciding whether the death penalty, as applied to a particular class of persons, is contrary to evolving standards of decency. In *Atkins*, 536 U.S., at 316 n.21, this Court cited the brief of amicus United States Catholic Conference[3] and other religious organizations as "additional evidence" of a broad "social and professional consensus" against the execution of persons with mental retardation. In *Stanford v. Kentucky*, 492 U.S. 361 (1989), four Justices considered the view of a similar coalition of religious groups in considering the constitutionality of the juvenile death penalty, the precise question presented here. *Id.* at 388 n.4 (Brennan, J., joined by Marshall, Blackmun and Stevens, JJ., dissenting).

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[3] Subsequently renamed the United States Conference of Catholic Bishops, an amicus herein.

It is not surprising that the Court would consider the views of the religious community in deciding whether juvenile executions violate evolving standards of decency. Morality and decency are subjects on which religious bodies legitimately can claim a particular experience and competence. Important revivals of conscience in this country have had religious leaders and organizations at their center. Whether the call was for civil rights or other societal and legal reform, religious leaders have been at the forefront of these movements. *Cf. Bowen v. Kendrick*, 487 U.S. 589, 606-07 (1988) (noting the role of religious organizations in addressing secular problems in society).

The death penalty, in particular, involves quintessentially moral questions. Indeed, this Court has recognized that imposition of the death penalty in every case requires a moral judgment. *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989) (noting that capital punishment must reflect a "reasoned *moral* response to the defendant's background, character, and crime") (original emphasis). Moral questions are also implicated in this Court's proportionality review and its inquiry into whether punishment serves the purposes of legitimate retribution. *See* note 4, *infra*.

As religious bodies and religiously-affiliated organizations, these amici are uniquely qualified to comment on moral issues such as the death penalty. Few, if any, institutions can claim a greater tradition of working with and studying the conscience of the human person and related questions of guilt, blame and punishment than the religious community. The amici have developed a rich tradition of reflection and scholarship that has informed and been informed by the experience of countless millions of people over centuries. Failure to consider those views would diminish the authority this Court would bring to the resolution of these essentially moral questions.

That each case requires a moral response, however, has not prevented this Court from making categorical judgments about what is cruel and unusual. Certain kinds of crimes have been held categorically not to merit certain kinds of punishment, including the death penalty.[4] Similarly, and especially germaine to this case, the Court has held that certain kinds of offenders categorically do not merit the death penalty. *Atkins v. Virginia*, 536 U.S. 304 (2002) (Eighth Amendment bars execution of persons with mental retardation); *Thompson v. Oklahoma*, 487 U.S. 815 (1988) (Eighth Amendment bars execution of persons under the age of 16 at the time of the offense); *Ford v. Wainwright*, 477 U.S. 399 (1986) (Eighth Amendment bars execution of insane persons). These decisions – both with respect to the type of crime and the type of offender – are a natural outgrowth of the Court's teaching that the death penalty is reserved for the worst offenders and the worst offenses. *Atkins*, 536 U.S., at 319-20, and cases cited therein.

Despite their differing views about crime and punishment, all the amici agree that the execution of juvenile offenders is inconsistent with evolving standards of decency. Juveniles on the whole are less blameworthy than adults because they lack adult maturity. On this point, comparison with *Atkins* is apt.

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[4] *Solem v. Helm*, 463 U.S. 277, 303 (1983) (concluding that life sentence without possibility of parole is disproportionate and hence unconstitutional punishment for the writing of a "no account" check); *Enmund v. Florida*, 458 U.S. 782, 797-98 (1982) (concluding that death penalty is disproportionate and hence unconstitutional penalty for felon who neither kills, attempts to kill, nor intends to kill, because, among other things, the resulting harm and culpability are less than that associated with murder); *Coker v. Georgia*, 433 U.S. 584, 598 (1977) (concluding that death penalty is disproportionate and hence unconstitutional penalty for rape because, among other things, it involves less moral depravity and injury to the person and the public than murder); *Weems v. United States*, 217 U.S. 349, 380-81 (1910) (concluding that 15-year sentence at hard labor for falsification of official document is disproportionate when compared with penalties imposed for, and harm caused by, other crimes).

"Recent empirical and theoretical scholarship on the developmental capacities of adolescents generally, and adolescent offenders in particular, suggests that adolescence itself is characterized by a constellation of development deficits that closely align with the developmental incapacities of the mentally retarded." Jeffrey Fagan, "*Atkins*, Adolescence, and the Maturity Heuristic: Rationales for a Categorical Exemption for Juveniles From Capital Punishment," 33 N.M. L. Rev. 207, 208 (2003). Thus, far from ensuring that the "most deserving of execution are put to death," *Atkins*, 536 U.S., at 319, allowing the execution of juvenile offenders, like persons with mental retardation, is a virtual guarantee that the *least* deserving will be put to death. Adolescent crimes are almost always associated with mitigating factors such as early exposure to violence and a highly disruptive family and social environment. Because of their age, society generally holds out greater prospects for the reform of youthful offenders. For these reasons, and for all the reasons set out in the individual statements of the amici *infra*, the execution of adolescents is contrary to contemporary moral sensibilities.

II. AMICI'S VIEWS CONCERNING THE EXECUTION OF JUVENILE OFFENDERS

As noted above, these amici's views about the death penalty *per se* vary, but they are united in their conviction that the execution of juvenile offenders violates contemporary standards of decency. Our individual views follow.

1. The Alliance of Baptists. The Alliance of Baptists "believe[s] the use of the death penalty cannot bring life or healing to victims and their families, or to offenders and their families." Statement on the Death Penalty, Alliance of Baptists Annual Meeting (April 28, 2000). We oppose its imposition because the death penalty "is used most often against the poorest

and most vulnerable members of our society." *Id.* Within this latter category, none is more vulnerable than the youthful offender whose ethical foundation has not been fully developed and whose rehabilitation is thus more likely to be realized. Of principal theological import in our opposition to the death penalty is the belief that "God's power to forgive is greater than humanity's power to do evil." *Id.*

2. The American Association of Jewish Lawyers and Jurists ("AAJLJ"). The AAJLJ opposes the execution of juvenile offenders as incompatible with Jewish law and morality and American constitutional values and standards. Under Jewish law and tradition, the imposition of the death penalty is severely proscribed by procedural rules that limit its use almost to the point of nullity. This virtual prohibition on the death penalty is expressed in a Rabbinic exchange recounted in the Talmud, where the Rabbis concluded that a Sanhedrin (Jewish court) that imposes a death penalty once every seventy-seven years is a "harsh" court. BT (Babylonian Talmud) Mishnah Makkot 7a.

Jewish law also recognizes the status of minors as a class not subject to the most dire punishment. Minors are considered inherently deficient in judgment until they reach majority. BT Hagiga 2b, BT Yevamot 99b, BT Gittn 23a. Therefore, Jewish law does not hold them responsible, but shows them mercy because of their diminished capacity. A general principle of Jewish law is that minors are not punished, even in cases that call for capital punishment. BT Tractate Sanhedrin 52b, 54a, 54b. The Talmud states that even if a minor was deliberate in his transgression, God has mercy on him. BT Tractate Sanhedrin 55b. These principles clearly prohibit the execution of a juvenile offender.

Deterrence as a justification for executing a juvenile offender would also be rejected under Jewish law. A Talmudic

commentary states: "For we do not find that God finds (the minor) guilty, and even in a situation where we (generally) need to punish (the sinner) to exhort the community – as in the case of a murder – we do not encounter cases where we punish a minor." Commentary of Rabbi Nissim of Gerondi [14th c. Spain] on BT Tractate Sanhedrin 68b.

3. American Friends Service Committee ("AFSC"). AFSC is opposed to the execution of any person, regardless of age. Quakers, on whose behalf AFSC undertakes its social justice work, believe firmly that every person has the potential for good and that those who have committed crimes can come to regret them and be rehabilitated. Our opposition to the execution of youth is also based on our belief in their great potential for good. From its earliest days, AFSC has supported the moral, spiritual, and physical development of young people. Our experience teaches that youth, properly nurtured and supported, are capable of the highest achievements and profound change. In our view, society should devote its resources to helping youth reach their potential, including the potential for rehabilitation.

4. The American Jewish Committee. While Jewish Biblical tradition mandates the imposition of capital punishment under certain, rare circumstances, Rabbinical interpretation of that tradition has required such procedural assurances with respect to the application of the death penalty that it, in effect, virtually prohibits it. For these reasons, the American Jewish Committee opposes capital punishment in general, as cruel, unjust and incompatible with the dignity and self-respect of man, and in particular opposes the execution of persons for crimes they committed as juveniles.

5. The American Jewish Congress. The American Jewish Congress is opposed to the juvenile death penalty because it believes that juveniles are not capable of mature judgment, and

hence do not have the degree of moral culpability which is a prerequisite for the use of the death penalty.

6. The Bruderhof Communities Church International ("The Bruderhof"). The Bruderhof is opposed to the execution of any person, regardless of age. Bruderhof members hold to Biblical teachings that evil in the world will never be conquered with more violence, but only by greater love. We are firmly convinced of the redemptive power of forgiveness and reconciliation, particularly as regards youthful offenders. We affirm the Biblical teaching that "when a wicked man turns away from the wickedness he has committed and does what is lawful and right, he shall save his life. Because he considered and turned away from all the transgressions which he has committed, he shall surely live, he shall not die...." Ezekiel 18:27-32. The execution of juvenile offenders obviously and irrevocably denies youthful offenders the opportunity for rehabilitation, and violates our belief in the sanctity and dignity of human life. Such executions should be rejected.

7. Buddhist Peace Fellowship. We oppose all executions, in keeping with the First Precept of Buddhism, which says not to harm any living thing. Furthermore, we see that executing juvenile offenders is even more contrary to Buddhist principles of compassion and the ever present possibility of transformation than executing adults. The absence of any mention of juvenile executions in the Pali canon (a primary source for the Buddha's teachings) underscores how inconceivable that notion was to the earliest practitioners of Buddhism. Modern society likewise understands the vulnerability of youth to the influence of others, and their need for guidance from parents and other adults. Drivers' licenses, voting privileges, military service responsibilities, and other adult prerogatives are uniformly withheld from young people because it is commonly held that they are not ready for these responsibilities. When youth commit terrible

crimes, we see that as a call for extra care, restraint, and guidance. Buddhism recognizes the possibility of transformation and rehabilitation. People can change if given the right conditions for doing so.[5] That principle is even more pertinent to young people, who are still in their formative stages.

8. Church Women United ("CWU"). CWU has opposed the death penalty since 1979. "[T]he life of the victim," CWU's Social Policy Book states, "is further devalued by taking the life of another." Its 1981 Statement on the Abolition of Capital Punishment expresses CWU's conviction "that the nation's leaders should give attention to the improvement of the total criminal justice system and to the elimination of social conditions which breed and cause disorder rather than fostering a false confidence in the effectiveness of the death penalty."

This is especially true when considering the treatment of youth in the criminal justice system. The ability of youth to discern right from wrong is immature and undeveloped. Furthermore, there is a great need to address the underlying social conditions which foster criminal activity, especially in young people.

As a movement of Christian women who take their faith very seriously, CWU's opposition to the death penalty is coupled with deep concern for the physical, emotional, and spiritual needs of children and youth. CWU opposes the execution of juvenile offenders as a violation of the laws of God and humankind. Christ expressed a special concern for children and

[5] Traditionally in Asia troubled young people were sent to monasteries to live with monks and nuns, so that they could be raised in more wholesome and stable conditions. While this is not an option in modern, secular society, it does suggest that changes in social conditions can cause a change in the person. It is noteworthy that many troubled youth have grown up on the street. Many who commit terrible crimes have themselves been abused.

youth. So should the criminal justice system.

9. Community of Christ. Based on the action of its highest legislative body, the Community of Christ opposes the death penalty and prefers to seek ways to achieve healing and restorative justice. Similarly, the church's Standing High Council, a council of senior ministers that advises church leaders on matters of ethics and morality, has also stated its opposition to capital punishment. Because of its broad opposition to the death penalty, the Community of Christ opposes the death penalty for juvenile offenders.

10. Engaged Zen Foundation. The Engaged Zen Foundation believes that the execution of juvenile offenders disregards the immaturity of young people, the incomplete development of their impulse control, insight, wisdom and social skills, and their potential for growth. The imposition of the death penalty for crimes committed by juvenile offenders is profoundly objectionable because of its finality and its total disregard of the potential for positive change inherent in the natural maturing process.

11. The Evangelical Lutheran Church in America ("ELCA"). ELCA acknowledges that "[t]he state is responsible under God for the protection of its citizens and the maintenance of justice and public order. God entrusts the state with the power to take human life when failure to do so constitutes a clear danger to society. However, this does not mean that governments have an unlimited right to take life. Nor does it mean that governments must punish crime by death." A Social Statement on the Death Penalty, adopted by the Churchwide Assembly of the ELCA, Aug. 28 – September 4, 1991, at 2. The imposition of the death penalty generally, and as specifically applied to juvenile offenders, is in contradiction to what the ELCA affirms from Scripture, creeds and confessions as to the value of God-given

life and the commitment to serve God's justice. *Id.*

ELCA opposes the death penalty because of its commitment to justice. *Id.* at 4. "For the Evangelical Lutheran Church in America, following Jesus leads us to a commitment to restorative justice.... [E]xecutions do not restore broken society and can actually work counter to restoration." *Id.* at 3. "Executions harm society by mirroring and reinforcing existing injustice. The death penalty distracts us from our work toward a just society. It deforms our response to violence at the individual, familial, institutional, and systemic levels. It perpetuates cycles of violence." *Id.* at 4.

The execution of juvenile offenders is morally unjustifiable and "undermines any possible moral message we may want to 'send.'" *Id.* "Despite attempts to provide the legal safeguards, the death penalty has not been and cannot be made fair. The race of the victim plays a role in who is sentenced to death and who is sentenced to life imprisonment, as do the gender, race, mental capacity, age, and affluence of the accused." *Id.* "It is not fair and fails to make society better or safer. The message conveyed by an execution, reflected in the attention it receives from the public, is one of brutality and violence." *Id.*

As a community gathered in faith, as a community dispersed in daily life, as a community of moral deliberation, and as a church body organized for mission, we know the Church is called by God to be a creative critic of the social order, and to speak on behalf of justice, peace and order. We, the ELCA, therefore, "urge the abolition of the death penalty, and support alternative and appropriate punishment for capital crime," *id.* at 6, for juvenile offenders as well as others. A commitment to God's justice demands no less. *Id.* at 2.

12. Foundation for the Preservation of the Mahayana Tradition, Inc. It is essential to Buddhist belief and practice to help oneself and others; if it is not possible to help, then the least one must do is not harm. We believe the only way to help oneself and others is by practicing non-violence, particularly through the exercise of compassion and wisdom. Of the five principal moral precepts that Buddhism enshrines, the first is to refrain from killing. We believe in the law of karma – that actions produce consequences – and for the state to execute individuals is to create a violent cause that will result in yet more violence in the future. Execution therefore will not and does not further the state's legitimate aim of protecting its citizens. Additionally, it is our belief that juveniles should be treated more leniently than adults, and that it behooves us to treat these individuals with care and compassion and to give them a second chance, just as we ourselves would wish to be treated.

13. The General Council on Finance and Administration of The United Methodist Church. The United Methodist Church has opposed the death penalty since 1956. The Church's Social Principles state that "we oppose capital punishment and urge its elimination from all criminal codes." The Book of Discipline of The United Methodist Church ¶ 165(a) (2000). Further, "[t]he death penalty ... falls unfairly and unequally upon an outcast minority." The Book of Resolutions of The United Methodist Church No. 231 (2000). The United Methodist Church is opposed to the juvenile death penalty based upon its principled objection to all death penalty statutes.

14. Greek Orthodox Archdiocese of America. The protection of human rights and the inherent worth of every person and of all human life are of paramount importance and basic principles in the moral teaching of the Greek Orthodox Church. These principles require us to oppose the death penalty for

juvenile offenders.

15. The Most Reverend Frank T. Griswold, Presiding Bishop and Primate, The Episcopal Church in the United States of America. The Episcopal Church USA has opposed the death penalty since 1953 and most recently restated that position in 2000 at its governing meeting as follows: "[Resolved,] That the 73rd General Convention of the Episcopal Church reaffirm its opposition to capital punishment and call on the dioceses and members of this church to work actively to abolish the death penalty in their states; and be it further Resolved, That this Convention join those who are calling for an imposition of an immediate moratorium on the use of capital punishment."

At the same meeting, the Convention said the "Episcopal Church endorse[s] and support[s] justice that addresses the identified needs of juvenile offenders, their families, and victims within each community of the Church." Opposition to execution of juveniles is wholly consistent with the Church's longstanding interest in reform of the nation's criminal justice system and its specific policy of opposition to the death penalty.

16. Jewish Council for Public Affairs ("JCPA"). JCPA, the coordinating body of 13 national and 122 local Jewish federations and community relations councils, opposes the imposition of the death penalty against those who were under the age of 18 at the time of their offense and generally regards the taking of human life by authority of law as barbaric and repugnant to the traditional Jewish regard for the sanctity of human life.

JCPA historically has been opposed to the death penalty as inappropriate for a modern human society, and has a particular concern because of abundant evidence that the process by which the penalty is imposed is seriously flawed. The criminal justice system, as it encounters juveniles, lacks adequate safeguards to

prevent the execution of innocent minors.

17. Clifton Kirkpatrick, as Stated Clerk of the General Assembly of the Presbyterian Church (U.S.A.). Beginning in 1959, the General Assembly of the Presbyterian Church (U.S.A.) and its predecessors declared the church theologically and ethically opposed to the use of capital punishment. "Believing that capital punishment cannot be condoned by an interpretation of the Bible based upon the revelation of God's love in Jesus Christ, and that as Christians we must seek the redemption of evil doers and not their death, and that the use of the death penalty tends to brutalize the society that condones it, the 171st General Assembly (1959) declares its opposition to capital punishment." The 1966, 1977, 1978, and 1985 General Assemblies reaffirmed this statement and called upon the church to work for abolition of the death penalty, calling capital punishment an expression of vengeance which contradicts the justice of God on the cross. The 2000 General Assembly called for an immediate moratorium on all executions in all jurisdictions that impose capital punishment. The Presbyterian Church (U.S.A.) has consistently opposed capital punishment without distinction among categories of defendants, and for that reason opposes the execution of juvenile offenders.

18. Rev. Dwight M. Lundgren, Board of National Ministries, American Baptist Churches USA. The execution of juvenile offenders is contrary to American standards of justice, fairness and decency, standards under which people are punished according to the degree of their culpability and the death penalty is reserved for the "worst of the worst" offenders. Those standards are not met in the case of one who is a juvenile at the time of the offense. Adolescence is a transitional time of life when cognitive abilities, emotions, judgment, impulse control, and identity are still developing. Recent discoveries in neuroscience reveal that the brain continues to develop into the

early twenties, with the aforementioned executive functions developing last. Indeed, immaturity is the reason we do not allow juveniles to assume the basic responsibilities and privileges of adulthood, such as military service, voting, entering into contracts, or serving on juries.

19. Mennonite Central Committee ("MCC"), U.S. Washington Office. The MCC U.S. Washington Office is guided in its anti-death penalty advocacy by a 1982 MCC statement which says in part: "We believe the Mennonite and Brethren in Christ churches must act to enhance respect for human life, and that this cannot be done through executions. We recognize the seriousness and emotion with which this issue is considered by many Americans. We also recognize the difficulty of any simple answers to the issues of violent crimes." It is also guided by statements of its member denominations, for example: "In view of our Christian responsibility to value all human life we are compelled to set forth our opposition to all capital punishment. ...The death penalty is applied ... disproportionately to some of society's most vulnerable people. We [also] acknowledge the deep grief of families of murder victims and victims of capital punishment laws; hold them in our prayers; and commit ourselves to walk with them." A Resolution: The Death Penalty (Mennonite Church USA, 2001). The MCC U.S. Washington Office works along with others in the church and society in attending to the needs of victims and offenders, which includes the belief that juveniles need every opportunity to reform and grow into adulthood.

Church teaching also states: "Led by the Spirit, and beginning in the church, we witness to all people that violence is not the will of God. We witness against all forms of violence, including war among nations, hostility among races and classes, abuse of children and women, violence between men and women, abortion, and capital punishment." Confession of Faith in a

Mennonite Perspective, Article 22 (1995). The state has a role in the welfare of a society (Romans 13:1-7). However, this does not include the duty to take human life. Since all people are created in the image of God, the taking of life by the state is always cruel and unusual punishment. We find executing juveniles to be notably cruel and unusual given the Bible's constant regard for those who are weak, neglected and vulnerable (Psalms 146:5-9; Luke 4:18-19) and Jesus' special concern for children (Matthew 19:13-15; Mark 10:13-16; Luke 18:15-16).

20. Muslim Public Affairs Council. The Quran does sanction the use of the death penalty in certain circumstances. However, this is circumscribed by a variety of factors. First, the injunction to be merciful is emphasized throughout the Quran. Even in murder cases, the Quran clearly states that it is better to forgive. A democratic polity, by forgoing the death penalty in its entirety, can choose to enshrine in the law this divine mandate to be merciful. Our reading of the Islamic texts supports such a conclusion.

Second, the Quran clearly distinguishes acts based on the intention behind them. An intention to kill is necessary for an act to qualify as murder, while accidental death (what in American criminal law would be considered manslaughter) does not. Intention requires a level of mature judgment capable of understanding the nature of an act and its consequences. A mind incapable of such a judgment, due either to immaturity or physical or mental defect, cannot properly be held accountable for such an intention. Children, by their very nature, lack the maturity and judgment necessary to form a qualifying intent to murder, so they cannot be properly executed for such a crime. Individuals who are a physical threat to the security of others may still be separated from society in some manner, even if they are children or insane. To execute children for a capital crime,

however, is a gross miscarriage of justice from the Islamic standpoint, and would constitute a grievous sin by those responsible for such an act.

21. Muslim Women Lawyers for Human Rights ("Karamah"). Karamah supports a ban on capital punishment generally because it believes that the death penalty as applied by the justice system in the United States does not provide adequate protections to the accused or a well-developed system of restorative justice. Further, it supports a ban on capital punishment against juveniles for the same reasons given by major Islamic schools of thought.

Muslim scholars developed many schools of thought that differed drastically at times on various matters, including those relating to intentional killing. The Quran specifies that in the case of intentional killing, the penalty is based on the concept of *qisas* (retributive justice), but that it would be better if the family of the victim forgave the murderer. Quran 2:178. Referring to the availability of forgiveness under Islamic law as a preferred alternative to *qisas*, the same verse concludes: "This is a concession and a mercy from your Lord." Thus in Islam, forgiveness and mercy are better than retaliation, even when the latter is justified.

In the Islamic system of justice, the state, including the courts, do not have the power to impose the death penalty. The courts can only establish the innocence or guilt of the accused. If guilty, then only the family of the victim has the right to demand the death penalty, otherwise the court must impose other forms of punishment. Islamic jurisprudence was developed, however, so that the Quranic concept of restorative justice would supplement the notion of *qisas* by permitting the death penalty to be set aside if any member of the victim's family forgave the murderer. Jurists also permitted the family of

the victim to waive the death penalty in favor of reconciliation with the murderer if the latter repents and pays monetary compensation to the family. All these options – the death penalty, compensation, and forgiveness – are available under American criminal and civil law, but American law uses a different system of checks and balances that produces harsher results. Most significantly, forgiveness in the American justice system is relegated to the state. In the Islamic system, it is kept on a human and personal level, where the family of the victim is encouraged to forgive so that God will forgive and reward the departed and his family. Since the forgiveness of any member of the immediate family binds the rest, forgiveness becomes a healing experience untainted by political considerations. In practice, many families have indeed forgiven murderers.

All Islamic schools of thought have agreed that no *qisas* is to be exacted from a minor. This position is based on the shared premise that an important prerequisite for *qisas* itself is physical and mental maturity. In other words, *qisas* for a grave action such as murder may not be exacted from a perpetrator who is unable to properly and fully comprehend the consequences of his or her actions; but other lesser forms of *ta'ziri* (disciplinary) punishment may be imposed. This rule does not cover an adult killer who was drunk at the time of the crime, because his lapse of judgment was the result of his own choices, but it does cover an adult who was insane. In the absence of the prerequisites of physical and mental maturity, a murder is treated as manslaughter.[6]

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[6] Wihbah al-Zuhayli, 7 Al-Fiqh al-Islami wa Adillatuh (Islamic Jurisprudence and its Proofs) (11 volumes) 5665 (Damascus: Dar al-Fikr al-Mu'asser, 1997); Abd al-Fattah Kabbarah, Al-Fiqh al-Muqaran ([Islamic] Comparative Jurisprudence) 164 (Beirut: Dar al-Nafa'is, 1997), 33 Al-Mawsu'ah al-Fiqhiyyah (Encyclopedia of Islamic Jurisprudence) 261 (Kuwait: Ministry of Awqaf [Religious Endowments], 1995).

Islamic jurists disagreed as to the age at which a minor reaches maturity. It ranged from fifteen to nineteen. The age of maturity, however, varies with context. For example, maturity for handling financial affairs differs from that for marriage, prayer, or criminal action. In the case of criminal law, for the Hanafi school and the majority of Malikis – two schools of thought that are heavily represented in the United States – the age has been set at eighteen and nineteen, respectively.[7] The reasoning underlying these positions is based on the juristic principle that laws must be formulated in light of the general rule, not the exception. So, while some minors may mature at age fifteen, generally this is not the case for other minors. Further, in the interest of mercy and lightening the weight of God's punishment upon humans (*ta'khfif*) mentioned in the above-referenced verse, it is better to err in favor of saving lives, rather than ending them. For God states that killing one life unjustly is like killing all of humanity. Quran 5:35.

Thus, according to these two major schools of Islamic thought, the age of maturity for a minor in matters of criminal law is either eighteen or nineteen, but no less. Further, as stated earlier, both schools of thought exempt minors from the death penalty. We concur in these positions and thus support specifically a ban on capital punishment against anyone under the age of eighteen.

22. National Council of Synagogues. The Hebrew Bible is unambiguous in calling for the execution of criminals for a wide array of offenses. However, the Rabbinic tradition that evolved over thousands of years was repelled by the notion, arguing that "it is a bad thing for everybody." Our contemporary Jewish religious and moral leaders have developed a consensus that the practice of capital punishment is unacceptable in our time.

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[7] 'Awdah, Abdul Qadir, 1 Al-Tashri' al-Jina'i al-Islami 603 (Islamic Criminal Law) (Egypt, 1968).

Our tradition teaches that vengeance and retribution neither heal pain nor comfort the bereaved. Responding to violence with violence only breeds more violence and suffering. Though we understand society's concerns with punishing the guilty by meting out death as a form of retributive justice, we as religious people are called to a higher moral ground, seeking punishments that allow for healing, reconciliation and penance. The death penalty annihilates the possibility of reaching this higher ground, all the more so in the case of juvenile executions.

23. Prison Dharma Network ("PDN"). PDN, an interfaith organization, is opposed to the execution of any person, regardless of age. Members of PDN believe firmly that every person incarcerated has the potential for rehabilitation. Our opposition to the execution of juvenile offenders is also based on our spiritual beliefs, as "non-killing" is a core tenet of all religions represented by PDN. PDN has always supported the spiritual and educational development of young people. We believe that any youth, when nurtured and supported, is capable of leading a fulfilling and productive life. We also believe our society should devote its resources to helping support youth to reach their potential, including the potential for rehabilitation.

24. The Progressive Jewish Alliance. The Progressive Jewish Alliance believes that capital punishment, in particular the execution of juvenile offenders, is antithetical to both Jewish and American values.

While Biblical law mandates capital punishment for a number of offenses, Talmudic interpretations essentially abolished the death penalty 1,800 years ago. Talmudic rules regarding capital punishment erected procedural obstacles that made it virtually impossible for the death penalty ever to be imposed by the Sanhedrin (the high Jewish court). For example, the Rabbis ruled that two witnesses were required to testify not only that

they witnessed the act for which the criminal was being condemned, but also that they had warned the perpetrator beforehand that, if he carried out the offense, he would be executed, and that he accepted this warning and nevertheless stated his willingness to carry out the act despite the knowledge that it would result in his execution.

In addition to recording these procedural safeguards, the Talmud records the opposition of some of the tradition's great sages. Under Jewish law, juvenile offenders were not considered responsible or obligated because they were held to be unable to form the necessary intent. Because a finding of intent was a necessary prerequisite of guilt (and only a guilty party could be executed), juvenile offenders could not be put to death by a Jewish court.

In addition, in Judaism the purpose of the judicial system is not merely to punish or exact revenge, but to facilitate human development and *tshuvah*. *Tshuvah*, which means "returning from bad deeds" or "repentance," is a lifelong process of psychological and religious development that plays a crucial role in the judicial system. Only though *tshuvah* can one grow into a humble and refined human being with an appreciation for the purpose of the legal system and one's personal responsibility toward others. Understanding the importance of *tshuvah* is a crucial part of human development. Hence, Judaism refuses to punish minors as adults because doing so "short-circuits" the possibility of that development.

25. Southern Christian Leadership Conference ("SCLC"). The SCLC's founding president, Dr. Martin Luther King, Jr., believed that the death penalty both violates human rights and is a symptom of violence in society which could never serve as a remedy to violence. Additionally, the SCLC has opposed the death penalty because of its discriminatory application to the

poor and people of color.

Given their lack of maturity and their exclusion from participating in most adult activities, the execution of juvenile offenders is especially unjust. Further, our Biblical tradition teaches the value of redemption and rehabilitation to which juveniles are especially responsive. The execution of juvenile offenders is inconsistent with contemporary standards of decency in the United States and should be rejected.

26. Union for Reform Judaism and the Central Conference of American Rabbis. Jewish tradition has long had reservations about capital punishment. Though the Bible mandates the death penalty for 36 offenses, it also sets strict limitations on its implementation. For example, the death penalty could only be imposed upon the evidence presented by at least two witnesses (Deuteronomy 17:6); circumstantial evidence was not permitted. Multiple witnesses had to testify to both the central criteria of premeditation and intent, thereby minimizing the possibility of false convictions.

Dating back over two thousand years, the Rabbis amplified these restrictions to effectively legislate the death penalty out of existence. They added the requirement that the witnesses warn the defendant of the punishment in advance and that the defendant verbally acknowledge their warnings. Babylonian Talmud, Sanhedrin 40b. Witnesses who testified in error were themselves liable for the death penalty. The prospect that a court could be responsible for the erroneous execution of an innocent person was so horrific that the ancient sages declared:

> The Sanhedrin (supreme court) that puts to death one person in seven years is termed tyrannical. Rabbi Eleazar ben Azariah says, One person in seventy years. Rabbi Tarfon and Rabbi Akiba say,

> If we had been in the Sanhedrin, no one would have ever been put to death. Mishnah Makkot 1:10.

The ancient wisdom of our tradition resonates within the Jewish community even today. Every major branch of Judaism has taken a position against the juvenile death penalty and all have specific policy supporting either abolition of the death penalty or a moratorium on its use.

On the basis of both Jewish teachings and modern American sensibilities, the Union of Reform Judaism and Central Conference of American Rabbis oppose the execution of juvenile offenders. Not only do we object to the juvenile death penalty for the disproportionality of this form of punishment to culpability, as held by the Missouri Supreme Court, but also, as a religious people placing a high value on redemption and rehabilitation, we reject the juvenile death penalty's destruction of any hope of either. As stated by the Union for Reform Judaism in a 1959 resolution opposing capital punishment, "We pledge ourselves to join with like-minded Americans in trying to prevent crime by removal of its causes, and to foster modern methods of rehabilitation of the wrongdoer in the spirit of the Jewish tradition of *tshuva* (repentance)."

For our youth, more than in any other segment of society, the possibility of rehabilitation and repentance must not be cast aside. Only by banning the practice of juvenile capital punishment do we leave room for redemption. Our opposition to the death penalty is a religious commitment in keeping with the highest ideals of our Jewish heritage and the American legal tradition.

27. Unitarian Universalist Association. The Unitarian Universalist Association has opposed capital punishment since its first General Assembly as a consolidated denomination in 1961. Through adopted resolutions, the Association has declared that "respect for the value of every human life must be incorporated into our laws if it is to be observed by our people" and that "modern justice should concern itself with rehabilitation, not retribution." Because the member congregations of the Unitarian Universalist Association covenant to affirm and promote the inherent worth and dignity of every person, the Association strongly opposes the execution of juvenile offenders.

28. United Church of Christ ("UCC"). UCC's Tenth General Synod (1975) approved a resolution on penal reform which called upon the Church to work for improvement of the criminal justice system. The resolution expressed UCC's belief that prisons should be primarily institutions for the training and rehabilitation of inmates. In its 22nd General Synod (1999), UCC reaffirmed its staunch position challenging the use of execution in any circumstance, as a contradiction of God's grace and sovereignty in human life, and called for a death penalty moratorium. In its 23rd General Synod (2001), UCC cited the unconscionable use of execution and life imprisonment of those who commit crimes in their youth, and resolved to advocate for "just, appropriate, and ethical methods to address juvenile crimes...." In this resolution, UCC joined the United Nations Convention on the Rights of the Child (Article 37) (1995) in calling for an end to both capital punishment and life imprisonment for offenses committed by persons under eighteen years of age.

29. United States Conference of Catholic Bishops. The Catholic Church accepts in "principle that the state has the right to take the life of a person guilty of an extremely serious crime...." U.S. Bishops' Statement on Capital Punishment ¶ 4 (Nov. 1980). But the execution of an offender, the Church

teaches, can be justified only "in cases of absolute necessity," that is, when "it would not be possible otherwise to defend society." Pope John Paul II, Evangelium Vitae (The Gospel of Life) ¶ 56. "Today ... as a result of steady improvements in the organization of the penal system, such cases are very rare if not practically non-existent." *Id.* *See also* Catechism of the Catholic Church ¶ 2267 (2d ed. 1997) ("the traditional teaching of the Church does not exclude recourse to the death penalty, if this is the only possible way of effectively defending human lives against the unjust aggressor").[8]

The execution of juvenile offenders is particularly objectionable when viewed through the lens of the Church's moral tradition. "[S]ociety must never respond to children who have committed crimes as though they are somehow equal to adults – fully formed in conscience and fully aware of their actions." Catholic Bishops of the United States, "Responsibility, Rehabilitation, and Restoration: A Catholic Perspective on Crime and Criminal Justice," at 28 (2000). This is true in assessing culpability and deciding on punishment, for young offenders generally do not possess the knowledge, experience, reflectiveness, self-control, and judgment that are characteristic of an adult personality. Children are not miniature adults. Their youthfulness, which should not be disregarded even when they become involved in serious crimes, has often been cited by the Bishops in their respective regions of the country as a particular

[8] This universal teaching of the Church is mirrored in the statements of the Catholic Bishops of the United States who, for more than thirty years, have "called for an end to the death penalty in our land." Statement of the Administrative Board, United States Catholic Conference, "A Good Friday Appeal to End the Death Penalty" (March 1999). The Bishops' appeal to abolish the death penalty is based on their conviction that "in the conditions of contemporary American society, the legitimate purposes of punishment do not justify the imposition of the death penalty." U.S. Bishops' Statement on Capital Punishment ¶ 9 (Nov. 1980).

reason for not imposing the death penalty in specific cases involving juvenile offenders. As noted by the Missouri Catholic Conference[9] shortly after this Court granted certiorari in the instant case, "[i]t is hard to understand that a nation that requires persons to be 18 to be declared a legal adult, to vote, serve in the military, make decisions about their own medical treatment, or even buy a pack of cigarettes can allow adolescents to be treated like adults for the purpose of the death penalty." Missouri Catholic Conference, News Release (Jan. 28, 2004).

CONCLUSION

This Court's insistence on "individualized consideration as a constitutional requirement in imposing the death sentence," *Lockett v. Ohio*, 438 U.S. 586, 605 (1978), has never prevented it from declaring that certain categories of crimes and certain classes of defendants are constitutionally beyond the reach of the death penalty. *See* note 4, *supra*. A similar exemption for juvenile offenders is warranted by virtue of the Nation's evolving standards of decency, as demonstrated by the views of these amici. All the amici agree that the death penalty – a penalty this Court has said must be reserved for the most blameworthy – should not be imposed upon juveniles.

[9] The Missouri Catholic Conference is the public policy arm of the Catholic Bishops in Missouri, each of whom is also a member of the United States Conference of Catholic Bishops.

For these reasons, and for the other reasons set forth in this Brief, we respectfully urge that the judgment below be affirmed.

Respectfully submitted,

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APPENDIX (List of Amici)

1. Alliance of Baptists ("The Alliance"). The Alliance is an ecumenically oriented association of individuals and some 120 congregations with an aggregate membership of more than 60,000 persons. Although Baptist polity does not permit any Baptist to speak for another or any association of Baptist churches to speak definitively for any of its constituent congregations, the position of the Alliance with respect to the death penalty for juveniles has been duly established within its ecclesiastical framework. Since April 28, 2000, the Alliance has been on record in opposing the death penalty generally, including the execution of juvenile offenders.

2. The American Association of Jewish Lawyers and Jurists ("AAJLJ"). The AAJLJ is a membership association of lawyers and jurists open to all members of the professions regardless of religion. It is an affiliate of the International Association of Jewish Lawyers and Jurists, which is based in Israel and was founded by the late Justice Arthur Goldberg of the United States Supreme Court and the late Justice Haim Cohen of the Supreme Court of Israel. The mission of the AAJLJ is to promote an understanding of the principles of traditional Jewish law among the bar, the judiciary and the public, including an understanding of the relevance and applicability of Jewish law to current legal issues and controversies, through participation as amici in appropriate cases, educational programs and other means of outreach. The AAJLJ also represents the interests of the Jewish community with regard to legal issues affecting the community.

The AAJLJ strongly believes that the execution of a person who was a juvenile at the time of the commission of a capital crime is contrary to the principles of Halakah (Jewish law), principles that limit the death penalty to only the very few most deserving and that preclude it in the case of a person with

limited capacity, such as a juvenile, and, as the Court has already recognized, the mentally retarded.

3. The American Friends Service Committee ("AFSC"). Since its founding in 1917 on behalf of the Meetings and members of the Religious Society of Friends (Quakers) in America, AFSC has been active in works of humanitarian relief and service, reconciliation among nations and peoples, and programs to overcome discrimination and oppression. AFSC has a vital interest in this litigation because of Friends' historic and continued opposition to the taking of human life by the State. This opposition to capital punishment is based on Friends' belief in the infinite worth of each human being and the equality of all human beings in the sight of God.

In 1976, the AFSC Board of Directors restated its opposition to the death penalty. The Board stated in part:

> It is bad enough that murder or other capital crimes are committed in the first place, and our sympathies lie most strongly with victims. But the death penalty restores no victim to life and only compounds the wrong committed in the first place. We reaffirm that there is no justification for taking the life of any man or woman for any reason.

Many members of the Religious Society of Friends are strongly opposed to the imposition of the death penalty and are unable to participate in the taking of human life because of their religious convictions. AFSC's interest in this appeal relates to Friends' historic and continued advocacy for the rights of children and adolescents, because of our recognition of their profound potential for rehabilitation, and because of our profound opposition to the taking of human life by the State.

4. The American Jewish Committee ("AJC"). AJC, a national human relations organization with over 125,000 members and supporters and 33 regional chapters, was founded in 1906 to protect the civil rights and religious liberty of Jews. It is the conviction of AJC that those rights will be secure only when the rights of all Americans are equally secure.

AJC's longstanding position that "capital punishment degrades and brutalizes the society which practices it," resulted in the agency's filing an amicus brief in the case of *Thompson v. Oklahoma* in which we argued that the imposition of the death penalty on those who have committed capital crimes while under the age of eighteen, the generally-recognized dividing line in our legal system between adult responsibilities and childhood, was contrary to evolving standards for decency and thus violative of the Eighth Amendment. We join in this brief to assert again that principle.

5. American Jewish Congress. The American Jewish Congress is an organization of American Jews founded in 1918 to protect the civil, political, religious, and economic rights of American Jews and all Americans. It has opposed the death penalty in the United States because it believes that, given the current state of the criminal justice system, it cannot be administered in ways that comply with elementary notions of justice and fairness.

6. Bruderhof Communities Church International ("The Bruderhof"). The Bruderhof is an international Christian communal movement with more than 2,500 members, founded in 1920 in Europe. The Bruderhof has existed in the United States since 1954, with current communities located in New York and Pennsylvania. Based on Jesus Christ's teachings on nonviolence, peace and justice, Bruderhof members live in complete community of goods, testifying in word and deed that

love, justice, and peace are the will of God for all mankind. Sharing common Anabaptist roots with the Hutterites, Amish and Mennonites, the Bruderhof adheres to Christian nonviolence and a belief in the sacredness and dignity of all human life. The Bruderhof has participated over many years in movements for justice and peace, among them the growing movement to abolish the death penalty. Current projects include the promotion of nonviolent conflict resolution in public schools, and witnessing to the restorative power of forgiveness and reconciliation.

7. Buddhist Peace Fellowship. Buddhist Peace Fellowship, founded in 1978, is an international Buddhist organization that serves as a catalyst for socially engaged Buddhism. Our aim is to help people liberate themselves from the suffering that manifests in individuals, relationships, institutions, and social systems through the Buddhist teachings of wisdom and compassion. Buddhist Peace Fellowship is guided by intentions to recognize the interdependence of all beings, practice nonviolence, and work with Buddhists from all traditions.

8. Church Women United. Church Women United is a national volunteer-based, Christian-based, racially, culturally and theologically inclusive movement of millions of intergenerational women throughout the United States who celebrate unity in diversity, seek interreligious cooperation, and work in numerous ways for a world of peace with justice. Church Women United began its ecumenical work 62 years ago. It has a compassionate and intense concern for the care and well being of women, children and families.

9. Community of Christ. The Community of Christ is an international Christian denomination with 250,000 members found in more than fifty nations. Its World Headquarters, including a Temple dedicated to the pursuit of peace, is located in Independence, Missouri. The church was organized in 1830 in New York State.

10. Engaged Zen Foundation. Engaged Zen Foundation is an American Zen Buddhist group originally founded as a prison outreach group. Its experience working in prisons throughout the United States over the past dozen years has compelled it to focus its efforts on the complete circle of human rights imperatives. Engaged Zen Foundation is particularly concerned about the treatment of juveniles in the criminal justice system.

11. The Evangelical Lutheran Church in America ("ELCA"). ELCA is the largest Lutheran denomination in North America and the fifth largest Protestant church body in the United States. It has approximately 11,000 member congregations, which in turn have approximately 5.1 million individual members nationwide. Through the adoption of social statements by the ELCA Churchwide Assembly, the church's highest legislative body, the ELCA adopts policy positions on issues of public importance, such as capital punishment. In 1991 the Churchwide Assembly of the ELCA adopted "A Social Statement on the Death Penalty."

12. Foundation for the Preservation of the Mahayana Tradition ("FPMT"). FPMT is an international network of Tibetan Buddhist organizations in the Gelugpa tradition. A central entity that coordinates certain activities of FPMT's many affiliates in the USA and abroad is the Foundation for the Preservation of the Mahayana Tradition, Inc., the Spiritual Director of which is Lama Thubten Zopa Rinpoche. There are at present approximately 130 centers worldwide affiliated with FPMT, 13 of which are in the USA and which include centers for Buddhist studies, retreat centers, hospices, schools, and a leprosy hospital in India. As practicing Tibetan Buddhists, we are interested in this case because, in our view, capital punishment, especially

executing a person for crimes committed as a juvenile, is cruel, unhelpful, and actually damaging to society.

13. The General Council on Finance and Administration of The United Methodist Church ("UMC"). The General Council on Finance and Administration is a national agency of UMC that supports local churches with financial and property administration issues. It is the general agency which has been given primary responsibility for legal issues affecting the denomination. UMC is a worldwide religious denomination with approximately 9 million members in the United States. Through its General Conference, UMC has declared that we "oppose capital punishment and urge its elimination from all criminal codes."

14. Greek Orthodox Archdiocese of America. The Greek Orthodox Archdiocese of America has approximately 540 parishes in the United States, with a membership of 1.5 million people. It includes nine dioceses and parishes in all 50 states. It is an eparchy of the Ecumenical Patriarchate of Constantinople, the spiritual center for 280 million Orthodox Christians worldwide.

15. The Most Reverend Frank T. Griswold, Presiding Bishop and Primate, The Episcopal Church in the United States of America. The Most Rev. Frank T. Griswold is Presiding Bishop and Primate of The Episcopal Church, USA. The Episcopal Church, USA has approximately 2.4 million members with about 7,600 congregations. Jurisdiction includes 100 dioceses in the 50 states, with several overseas dioceses in Latin America, the Caribbean, the Pacific and Taiwan. The denomination is a member province of the Anglican Communion, which has a global membership of 70,000,000.

16. Jewish Council for Public Affairs ("JCPA"). The JCPA, the coordinating body of 13 national and 122 local Jewish federations and community relations councils, was founded in 1944 to safeguard the rights of Jews throughout the world and to protect, preserve, and promote a just society. The JCPA recognizes that the Jewish community has a direct stake – along with an ethical imperative – in assuring that America remains a country wedded to the Bill of Rights. The JCPA's work reflects the profound Jewish commitment to *tikkun olam*, the repair of the world, and expresses the conviction of the organized Jewish community that it must be active in the effort to build a just society.

17. Clifton Kirkpatrick, as Stated Clerk of the General Assembly of the Presbyterian Church (U.S.A.). Clifton Kirkpatrick, as Stated Clerk of the General Assembly, is the senior continuing officer of the Presbyterian Church (U.S.A.). The Presbyterian Church (U.S.A.) is a national Christian denomination with nearly 2.5 million members in more than 11,200 congregations, organized into 173 presbyteries under the jurisdiction of 16 synods. Through its antecedent religious bodies, it has existed as an organized religious denomination within the current boundaries of the United States since 1706. This brief is consistent with the policies adopted by the General Assembly regarding capital punishment. The General Assembly does not claim to speak for all Presbyterians, nor are its decisions binding on the membership of the Presbyterian Church. The General Assembly is the highest legislative and interpretive body of the denomination. As such, its statements are considered worthy of respect and prayerful consideration of all the denomination's members.

18. Rev. Dwight M. Lundgren, Board of National Ministries, American Baptist Churches USA. The Board of National Ministries is a mission and discipleship organization of the American Baptist Churches USA ("ABCUSA"). It was founded

in 1832 as the American Baptist Home Mission Society. With its partner mission organization, the Board of International Missions, ABCUSA, National Ministries provides ministry, mission and discipleship resources for the constituent churches, regions and members of the ABCUSA.

19. The Mennonite Central Committee ("MCC"), U.S. Washington Office. The MCC U.S. Washington Office, established in 1968 as part of a faith-based international relief, development and peacemaking agency, is a Mennonite and Brethren in Christ presence on Capitol Hill providing and encouraging prophetic witness to the way of Christ on matters of U.S. public policy. The office is guided by the Biblical themes of justice for all, with special concern for poor and oppressed people (Deuteronomy 24:17-22); nonviolent peacemaking (Matthew 5:9, 38-48); dismantling racism and sexism (Gal. 3:25-28; Eph. 2:11-22); human rights, including freedom of conscience and religious practice (Prov. 31:8-9; Luke 4:18-19; Acts 5:17-42); and care for the earth (Genesis 1:28-30; Psalms 8:5-8). Mennonites have opposed the death penalty throughout their nearly 500-year history. Many MCC constituents work, individually and corporately, in the areas of mental health and restorative justice to bring about healing for victims, offenders, and community. The execution of juveniles counters our convictions and work.

20. Muslim Public Affairs Council ("MPAC"). MPAC is an organization that seeks to give the American Muslim community a voice in public policy. It was founded in 1989 in Los Angeles and currently has chapters in 12 states, with its largest presence in California and New York. MPAC has achieved the status of the leading public policy voice in the Muslim community in the United States. It has a democratic governance structure with a board elected from the membership, and an executive director who works under the supervision of the elected board. MPAC is non-partisan, and accepts donations only from U.S. citizens or U.S. permanent residents. It embraces a progressive and thoughtful interpretation of the Islamic tradition.

21. Muslim Women Lawyers for Human Rights ("Karamah"). Karamah is an educational and charitable organization committed to supporting human rights worldwide, especially the rights of Muslim women. It is our goal to empower and improve the status of Muslim and immigrant women in the United States and globally through education, leadership development, Islamic jurisprudential development, legal activism, and advocacy. We stand committed to civil rights and other related rights under the U.S. Constitution. Karamah is founded upon the idea that education, dialogue, and action can counter the dangerous and destructive effects of ignorance, silence, and prejudice.

22. National Council of Synagogues. The National Council of Synagogues is a partnership of the Conservative and Reform Jewish Movements. Comprised of the United Synagogue of Conservative Judaism, the Rabbinical Assembly, the Union for Reform Judaism, and the Central Conference of American Rabbis, it represents 3,200 rabbis and over 1,700 congregations. It is actively engaged in furthering interreligious understanding on a national level, working closely with Christian colleagues to develop interfaith dialogue curricula, study guides, films and other projects.

23. Prison Dharma Network. The Prison Dharma Network is an international interfaith contemplative support network for prisoners, prison volunteers, and correctional workers. Its mission is to provide prisoners and staff with effective contemplative tools for self-transformation.

24. Progressive Jewish Alliance ("PJA"). PJA is a national membership organization dedicated to the Jewish traditions of ensuring social and economic justice, promoting equality and diversity and pursuing peace. Under the rubric of "Tikkun Olam, Tikkun Ha Ir" ("Repair of the World, Repair of the City"), PJA works in alliance with other organizations and individuals similarly dedicated to achieving these goals in Southern California and beyond. PJA is a progressive voice in the Jewish community and a Jewish voice in the progressive community. The issues raised in this case are of profound concern to PJA, which believes that capital punishment, and in particular the execution of juvenile offenders, is antithetical to both our Jewish and American values.

25. Southern Christian Leadership Conference. The Southern Christian Leadership Conference was co-founded in 1957 by the Rev. Dr. Martin Luther King, Jr., and other civil rights pioneers, to promote human rights nationwide and abroad. The Conference is a nonprofit, non-sectarian, inter-faith advocacy organization that continues to place human rights and social justice at the forefront of America's agenda, and is committed to non-violent action to achieve social, economic, and political justice.

26. Union for Reform Judaism and the Central Conference of American Rabbis. The Union for Reform Judaism and the Central Conference of American Rabbis, the congregational and rabbinic arms of the Reform Jewish Movement, encompass 1.5 million Reform Jews in 900 congregations 'onwide and 1,800 Reform rabbis. They provide leadership and vision to Reform Jews on spiritual, ethical, and political issues, applying the insights of Jewish tradition to such domestic and foreign issues as civil and human rights, civil liberties, religious freedom, and other major societal concerns.

27. Unitarian Universalist Association. The Unitarian Universalist Association is a religious association of more than 1,000 congregations in the United States and North America. Through its democratic process, the Association adopts resolutions consistent with its fundamental principles and purposes. In particular, the Association has adopted numerous resolutions expressing its opposition to the death penalty. Most relevant to the case at bar is the Association's resolution specifically opposing the execution of minors, including those from 16 years of age. The resolution was adopted consistent with the Association's principles and purposes affirming the inherent worth and dignity of every person.

28. United Church of Christ ("UCC"). UCC was formed in 1957 as a union of traditions dating back to the Congregational Churches of the Pilgrims (1620), the Puritans of Massachusetts Bay Colony (1629), the Reformed Church in the United States (1725), emerging Christian Churches (1700s and 1800s), and the Evangelical Synod of North America (1817). Through the years, other groups have joined this union from among American Indians, Afro-Christians, Asian Americans, Pacific Islanders, Hispanic Americans, Volga Germans, and Armenians. UCC is an international Church of 1 ½ million members, noted for its diversity and guided by the motto, "That they may all be one." John 17:21.

UCC heralds as its calling the proclamation in word and action of the Gospel of Jesus Christ, and is covenanted to work for reconciliation and unity, seeking justice and liberation for all.

29. The United States Conference of Catholic Bishops ("USCCB"). The USCCB is a nonprofit corporation organized under the laws of the District of Columbia. Its members are the active Catholic Bishops of the United States. The USCCB is a

vehicle through which the Bishops speak cooperatively and collegially on matters affecting the Catholic Church, its people, and society in general. The USCCB advocates and promotes the pastoral teaching of the Church on diverse issues, including the protection of human rights and the sanctity and dignity of human life.

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